TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 207

THE MONTANA NATIONAL BANK OF BILLINGS, PLAINTIFF IN ERROR,

vs.

YELLOWSTONE COUNTY OF THE STATE OF MONTANA AND HENRY S. NUTT, AS COUNTY TREASURER, ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA

FILED [redacted]

(28,671)

(32,571)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 1004

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vs.

YELLOWSTONE COUNTY OF THE STATE OF MONTANA AND HENRY S. NUTT, AS COUNTY TREASURER, ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 12, 1927

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[fol. 2]

IN DISTRICT COURT OF YELLOWSTONE COUNTY

THE MONTANA NATIONAL BANK OF BILLINGS, a National Banking Corporation, Plaintiff,

vs.

YELLOWSTONE COUNTY OF THE STATE OF MONTANA, a Municipal Corporation, and Henry S. Nutt, as County Treasurer of Yellowstone County, State of Montana, Defendants

AMENDED COMPLAINT

Comes now the plaintiff above named, by and through the undersigned, his attorneys, and complains of the defendants, and for cause of action alleges:

I

That the said plaintiff, The Montana National Bank of Billings, was at all times herein mentioned, and is now, a corporation, duly organized and existing under and by virtue of the laws of the United States of America, with its principal place of business at Billings, County of Yellowstone, State of Montana.

II

That the defendant, Yellowstone County, was at all times herein mentioned, and is, now, a municipal corporation, organized and existing under and by virtue of the laws of [fol. 3] the State of Montana, and was at all times herein mentioned, and is now, a County of the said State of Montana, duly established, organized and existing under the Constitution and laws of the said State of Montana, with its County Seat at the City of Billings, within the said

County; and that the defendant, Henry S. Nutt, is now, and during all times herein mentioned, was, the duly elected, qualified and acting County Treasurer of the defendant, Yellowstone County, Montana, a municipal corporation and subdivision of the State of Montana, as aforesaid, and ex-officio collector of taxes for said County;

III

That at all times herein mentioned one J. S. Simineo was, and now is, the duly elected, qualified and acting Assessor of the defendant, Yellowstone County, Montana, a municipal corporation, as aforesaid;

IV

That at all times herein mentioned, the paid up capital stock of the plaintiff was, and now is, the sum of One Hundred Thousand Dollars ($100,000.00), divided into one thousand (1,000) shares of the par value of One Hundred Dollars ($100.00) each; that at the close of business the day next preceding the first Monday in March, 1925, and on the first Monday in March, 1925, the surplus fund of the said plaintiff, in addition to its capital stock aforesaid, was Fifty Thousand Dollars ($50,000.00), and its undivided profits, likewise in addition thereto, was the sum of Two Thousand Six Hundred Fifty-nine and 13/100 Dollars ($2,659.13);

[fol. 4]

V

That at all times herein mentioned the following named persons and firms were, and now are, the holders and owners of all the shares of the capital stock of the said plaintiff, in the number and to the amount, hereinafter set forth, to-wit:

Name of shareholder	Number of shares
John Clay & Company	58
G. B. Kirby	40
A. H. Marble	90
C. E. Hawver	12
W. E. Reed	16
John Clay	173
C. O. Robinson	103
J. G. Forrest	79
F. H. Connor	80
C. A. Cleman	79
A. R. McDermott	10
R. B. Morrison	10
F. W. Marble	10
E. N. Langworthy	160
J. C. Worthen	20
Rudolph Molt	60
Total	1,000

and that particularly at the close of business on the day next preceding the first Monday in March, 1925, and on the first Monday in March, 1925, and on November 30, 1925, the persons and firms aforesaid were such owners and holders of the said capital stock;

[fol. 5] VI

That at all times herein mentioned the plaintiff was, and now is, engaged in the business of general commercial banking, and particularly, in the issue of notes, payable on demand, intended to circulate as money, and in receiving deposits of money, payable on demand, or at a specified time, in discounting commercial paper, in making loans of money, both unsecured and on collateral security, in buying and selling bills of exchange and other negotiable paper, in negotiating loans and dealing in negotiable securities issued by the Government, State, National and municipal, and by other corporations, and generally, in the transaction of all manner of business, customarily and ordinarily undertaken by a commercial bank.

VII

That at all times herein mentioned, and particularly during the year 1925, the Security Trust and Savings Bank, a banking corporation, organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at the City of Billings, in the County of Yellowstone, Montana, was, and now is, engaged in the business of general commercial banking in direct and immediate competition with the business of the plaintiff aforesaid, and in all respects similar thereto, except in the issue of notes payable on demand intended to circulate as money; and that at all times herein mentioned, and particularly during the year 1925, there were, and now are, approximately one hundred and fifty (150) corporations, organized and existing under and by virtue of the laws of the State [fol. 6] of Montana, with their principal places of business at various towns and cities throughout the said State of Montana, engaged in the business of general commercial banking in direct and immediate competition with the business of the plaintiff aforesaid, and in all respects similar thereto, save and except in the issue of notes payable on demand and intended to circulate as money.

VIII

That at all times herein mentioned, the plaintiff used and employed, and now uses and employs, moneyed capital, to-wit, moneys and credits, in the conduct of its commercial banking business aforesaid, wherefrom it derives its income and profits, and the full cash value of which, at the close of business the day next preceding the first Monday in March, 1925, and on the first Monday in March, 1925, was, in gross, the sum of Two Million, Two Hundred Fifty-one and 71/100 Dollars ($2,000,251.71), including Liberty Loan Bonds of the United States, and other bonds and securities thereof, of the full cash value of One Hundred One Thousand Seven Hundred Eighty-one and 25/100 Dollars ($101,781.25), and, after deducting the amount of all deposits, and any indebtedness representing money borrowed for use in its said business, was, net, the sum of One Hundred Twenty-nine Thousand Four Hundred Sixty-three and 49/100 Dollars ($129,463.49), including such

Liberty Loan Bonds of the United States, aforesaid, and such other bonds and securities thereof, of the full cash value of One Hundred One Thousand, Seven Hundred Eighty-one and 25/100 Dollars ($101,781.25); and that at all times herein mentioned, and particularly on the dates [fol. 7] and at the times last aforesaid, the plaintiff was, and now is, the owner of furniture and fixtures of the full cash value of Twenty-three Thousand One Hundred Ninety-five and 64/100 Dollars ($23,195.64), and of no real estate whatsoever.

IX

That at all times herein mentioned, the Security Trust & Savings Bank, a banking corporation, as aforesaid, used and employed, and now uses and employs, moneyed capital, to-wit, moneys and credits, in the conduct of its commercial bankinb business, aforesaid, wherefrom it derives its income and profits, and the full cash value of which, at the close of business on the day preceding the first Monday in March, 1925, and on the first Monday in March, 1925, was, in gross, the sum of One Million Nine Hundred Thousand Nine Hundred Seventy-seven and 34/100 Dollars ($1,900,977.34), including Liberty Loan bonds of the United States, and other bonds and securities thereof, of the full cash value of One Hundred Sixty-nine Thousand Seven Hundred Fifty Dollars ($169,750.00), and, after deducting the amount of all deposits, and any indebtedness, representing money borrowed for use in its business aforesaid, was, net, the sum of $51,894.47, including such Liberty Loan Bonds of the United States aforesaid, and other bonds and securities thereof, of the full cash value of $169,750.00; and that at all times herein mentioned, and particularly on the dates and at the times last aforesaid, the said Security Trust & Savings Bank was, and now is, the owner of furniture and fixtures of the full cash value of $12,246.44, and of real estate of the full cash value of $62,375.00.

[fol. 8] X

Upon information and belief, that at all times herein mentioned, the State banking corporations, aforesaid, used and employed, and now use and employ, moneyed capital, to-wit, moneys and credits, in the conduct of their com-

mercial banking business, aforesaid, wherefrom they derive their income and profits, and the full cash value of which, at the close of business the day next preceding the first Monday in March, 1925, and on the first Monday in March, 1925, was, in gross, the sum of approximately $73,000,000.00, including Liberty Loan Bonds of the United States, and other bonds and securities thereof, of the full cash value of approximately $3,000,000.00, and, after deducting the amount of all deposits, and any indebtedness representing money borrowed for use in their business aforesaid, was, net, the sum of approximately $5,500,000.00, including such Liberty Loan Bonds of the United States, and other bonds and securities thereof, of the full cash value of approximately $3,000,000.00, as aforesaid; and that at all times herein mentioned, and particularly on the dates and at the times last aforesaid, the State banking corporations above mentioned were, and now are, the owners of furniture and fixtures of the full cash value of approximately $2,138,501.81, and of real estate of the full cash value of approximately $2,003,087.30;

XI

That in particular at all times herein mentioned, the moneyed capital aforesaid, of the State banking corporations above mentioned, and of the Security Trust and Sav- [fol. 9] ings Bank aforesaid, was, and now is, used and employed in general commerical banking business throughout the State of Montana, and in Yellowstone County, Montana, in direct and immediate competition with the moneyed capital of the plaintiff aforesaid, and with the shares of its capital stock, owned by the shareholders above named, at the close of business the day preceding the first Monday in March, 1925, and on the first Monday in March, 1925, and on November 30, 1925;

XII

That on or about March 2, 1925, and pursuant to Section 2066 of the Revised Codes of Montana, 1921, the cashier of the plaintiff, The Montana National Bank of Billings, made and delivered to J. S. Simineo, the Assessor, as afore-

said, of the defendant, Yellowstone County, Montana, and on demand of the Assessor therefor, a statement, verified by his oath, showing the name of each shareholder, with his residence and the number of shares belonging to him at the close of business the day next preceding the first Monday in March, 1925, as the same then appeared on the books of the said plaintiff bank, and showing also the face value of the capital stock, and the amount of surplus and undivided profits of the said plaintiff bank, and an estimate of the full cash value of the said stock on the day last aforesaid,—all as is herein alleged and set forth; that, as disclosed by the said statement, so made and delivered as aforesaid, at the close of business the day next preceding the first Monday in March, 1925, and on the first Monday in March, 1925, the sum of $152,659.13, was, and was estimated to be, the full cash value of the capital stock of the plaintiff bank, in the aggregate, and the sum of [fol. 10] $152.66 was, and was estimated to be, the full cash value of each share of such capital stock;

XIII

That thereupon, the said J. S. Simineo, the Assessor of the said County of Yellowstone, Montana, defendant, pursuant to Section 1999, subdivision 6, of the Revised Codes of Montana, of 1921, and to Chapter 162 of Part III of the Political Code of the Revised Codes of Montana, of 1921, pretended to assess the shares aforesaid of the capital stock of the plaintiff bank to the several shareholders thereof, hereinabove named, at the full cash value of $152,659.13, in the aggregate, that is, pretended to assess to such shareholders the several shares of the capital stock, aforesaid, and to fix the full cash value thereof for such pretended assessment, at the sum of $152.66, each; notwithstanding that at all times herein mentioned, and particularly at the close of business the day next preceding the first Monday in March, 1925, and on the first Monday in March, 1925, the gross amount of the moneys and credits of the plaintiff bank, as hereinabove specified, included Liberty Loan Bonds of the United States, and other bonds and securities thereof, in the sum of $101,781.25, as hereinabove alleged, and that in fixing the full cash value, in

the aggregate, of the shares of the said plaintiff bank at the sum of $152,659.13, as aforesaid, and the value of the several shares thereof at the sum of $152.66 each, as aforesaid, no deduction has been, or ever was, made, in any manner, or at all, from the gross moneys and credits of the plaintiff bank, or from its moneyed capital, or from the value of said shares, or otherwise, or at all, on account [fol. 11] of the Liberty Loan Bonds, and other bonds and securities of the United States, aforesaid, or on account of any thereof; but that, on the contrary, at all times herein mentioned, such bonds of the United States in the sum of $101,781.25 were and are, included in and made a part of the moneys and credits of the plaintiff bank, and of its moneyed capital, and of the full cash value of its said shares of capital stock, for the purposes of such pretended assessment, for the year, 1925, and in fixing the value of its said shares for taxation, for such year, to the shareholders above named; and notwithstanding further that, were the Liberty Loan Bonds of the United States, above mentioned, in the sum of $101,781.25 deducted or omitted from such moneys and credits of the plaintiff bank, or from its moneyed capital, or from the value of its said shares at the close of business the day next preceding the first Monday in March, 1925, and on the first Monday in March, 1925, the full cash value of the shares of its capital stock, aforesaid, would be the sum of $50,877.88, and no greater sum, and the full cash value of the several shares thereof would be the sum of $50.88 each, and no greater sum, for all purposes of assessment and taxation for the year, 1925, by the State of Montana, and the several political subdivisions thereof.

XIV

But that notwithstanding the premises and the manner and method aforesaid of fixing the full cash value of the shares of the capital stock of the plaintiff bank, for the purposes of assessment and taxation by the State of [fol. 12] Montana, and its political subdivisions, during the year, 1925, and that in fixing such value of the shares of the capital stock of the plaintiff bank, the full cash value of its moneys and credits invested in Liberty Loan Bonds of the United States, and in other bonds and securities thereof,

in the sum of $101,781.25, was not deducted or omitted from its moneys and credits, or from its moneyed capital, or from the value thereof, or of said shares, or otherwise, or at all, but was included therein and in the value of such shares, all as hereinabove alleged, nevertheless the shares of the capital stock of the banking corporations aforesaid, organized under the laws of the State of Montana, and transacting a commercial banking business in direct and immediate competition with the plaintiff bank, throughout the State of Montana, all as aforesaid, were neither assessed nor taxed for the year, 1925, in any manner, or at all, whether severally, or in the aggregate; that, in particular, the shares of the capital stock of the Security Trust and Savings Bank, a state banking corporation, as aforesaid, were neither assessed nor taxed for the year, 1925, in any manner, or at all, whether severally or in the aggregate; but that, on the contrary, in lieu of any assessment or tax, for such year, upon the shares of the capital stock of the said state banking corporations, and particularly of the said Security Trust and Savings Bank, the real estate, the furniture and fixtures and the moneyed capital of such state banking corporations, and particularly of the said Security Trust and Savings Bank, were assessed to such State banking corporations, and thereafter taxed by the State of Montana, and its several political sub-
[fol. 13] divisions; that in particular for the year, 1925, real estate in the sum of approximately $2,000,000.00, furniture and fixtures in the sum of approximately $2,-100,000.00 and moneyed capital in the sum of approximately $2,500,000.00 were assessed to such State banking corporations, and taxed, by the State of Montana, aforesaid, and its political subdivisions; and further that, for the year, 1925, real estate in the sum of $62,375.00, furniture and fixtures in the sum of $12,246.44, and moneyed capital in the sum of no dollars, were assessed to the said Security Trust and Savings Bank, aforesaid, by the said J. S. Simineo, as such County Assessor, and taxed by the said State of Montana, and by the defendant, Yellowstone County, Montana;

XV

That in fixing the value aforesaid of the moneyed capital of the certain State banking corporations above mentioned, and particularly of the Security Trust and Savings Bank, aforesaid, for assessment and taxation under the laws of the State of Montana, for the year, 1925, there was deducted and excluded from the moneys and credits of such banking corporation-, and particularly of the Security Trust and Savings Bank, aforesaid, the amount of its and their deposits, and of any indebtedness representing money borrowed for use in said business, as hereinbefore alleged, and in addition thereto, the full cash value of all Liberty Loan Bonds of the United States, and of other securities and obligations thereof; that, in particular, from the sum of $5,500,000.00, the full cash value of the moneyed capital of the State banking corporations of the State of Montana, at the close of business on the day next preceding [fol. 14] the first Monday in March, 1925, and on the first Monday in March, 1925, and appearing among the moneys and credits of such banking corporations at the date and times aforesaid, as hereinbefore alleged, there was deducted and excluded, by the county assessors of the several counties, and by the State and County Boards of Equalization of the State of Montana, in fixing the full cash value of the moneyed capital of such state banking corporations, aforesaid, for assessment during the year, 1925, the further sum of approximately $3,000,000.00, so invested in Liberty Loan Bonds of the United States, and in other bonds and securities thereof; and that by reason of such deduction and exclusion, as aforesaid, the moneyed capital of the certain state banking corporations, above mentioned, was assessed for such year, 1925, at the sum of approximately $2,500,000.00 notwithstanding that the true value of such moneyed capital was then and there approximately the sum of $5,500,000.00;

XVI

That in particular the sum of $169,750.00, so invested in Liberty Loan Bonds of the United States, and appearing among the moneys and credits of the said Security Trust and Savings Bank as aforesaid, was deducted and excluded from the moneyed capital of the said Security

Trust and Savings Bank by the said J. S. Simineo, County Assessor, in fixing as the full cash value of the money capital of the said Security Trust and Savings Bank for assessment during the year, 1925, and in ascertaining the full cash value of its moneyed capital for the purposes of such assessment; and that by reason of such deduction and exclusion from its moneys and credits as aforesaid, on ac- [fol. 15] count of the Liberty Loan Bonds of the United States in the sum above specified, the moneyed capital of the said Security Trust and Savings Bank was assessed at nothing notwithstanding that the true value of such moneyed capital was then and there the sum of $51,894.47;

XVII

That further, in particular, the shares of the capital stock of the Security Trust and Saving Bank, aforesaid, at the close of business the day next preceding the first Monday in March, 1925, and on the first Monday in March, 1925, were of the full cash value, in the aggregate, of $126,515.91, that is, of the full cash value of $126.52, each; but that by reason of the deduction and exclusion of the moneys of the said Security Trust and Savings Bank, so invested in Liberty Loan Bonds of the United States, as aforesaid, from the moneys and credits of said banking corporation, and from the moneyed capital thereof, the property of the said Security Trust and Savings Bank, to-wit: its real estate, furniture and fixtures, and moneyed capital aforesaid, was assessed for taxation for the year, 1925, by the said J. S. Simineo, as such Assessor, at the full cash value of $74,- 621.44, the equivalent, for taxation purposes, of an assessment of the shares of the capital stock thereof, at the full cash value of $74,621.44, in the aggregate, that is, at a sum less than the true full cash value of such shares by $51,- 894.47; and the equivalent further for taxation purposes of an assessment of the shares of the capital stock thereof, to the several shareholders, at the aggregate value of $12,- 246.44, and of the real estate of the said banking corpora- [fol. 16] tion, to such corporation, at the value of $62,- 375.00;

XVIII

That further, in particular, the shares of the capital stock of the banking corporations, aforesaid, organized

under the laws of the State of Montana, at the close of business on the day preceding the first Monday in March, 1925, and on the first Monday in March, 1925, were of the full cash value, in the aggregate, of approximately $9,600,000.00; but that by reason of the deduction and exclusion of the moneys of such state banking corporations, so invested in Liberty Loan Bonds of the United States, and in other bonds and securities thereof, as aforesaid, from the moneys and credits of said banking corporations, and from the moneyed capital thereof, the property of the said State banking corporations, to-wit, their real estate, furniture and fixtures, and moneyed capital aforesaid, were assessed for taxation for the year 1925, by the assessors of the several counties, and by the State and County Boards of Equalization, of the State of Montana, at the full cash value of approximately $6,600,000.00, the equivalent, for taxation purposes, of an assessment of the shares of the capital stock of such state banking corporations at the full cash value of approximately $6,600,000.00, in the aggregate, that is, at the sum less than the true full cash value of such shares by approximately $3,000,000.00; and the equivalent further, for taxation purposes, of an assessment of the shares of the capital stock thereof, to the several shareholders, at the aggregate value of $4,600,000.00, and the [fol. 17] real estate of the said banking corporations, to such corporations, at the value of $2,000,000.00;

XIX

That further, had the said shares of the capital stock of the Security Trust and Savings Bank, aforesaid, been assessed for taxation for the year 1925, at the full cash value thereof, less the value of all real estate of the said banking corporation, fixed in the same manner and by the same methods as was employed in ascertaining the full cash value of the shares of plaintiff bank for assessment purposes, for such year, as hereinabove alleged, such full cash value, less the value of all such real estate, for assessment purposes for the year, 1925, would have been the sum of $64,140.91 in the aggregate, that is, the sum of $64.14 each; and that had the shares of the capital stock of the banking corporations aforesaid, organized under the laws of the State of Montana, likewise been assessed for taxa-

tion for the year, 1925, at the full cash value thereof, less the value of all real estate of the said banking corporations, fixed in the same manner and by the same methods as was employed in ascertaining the full cash value of the shares of the plaintiff bank for assessment purposes, for such year, all as hereinabove alleged, such full cash value, less the value of all such real estate, for assessment purposes for the year, 1925, would have been the sum of approximately $7,600,000.00 in the aggregate;

XX

That by reason of the difference, aforesaid, between the method employed and used in fixing the value of the shares of the capital stock of the plaintiff bank for assessment [fol. 18] purposes, during 1925, and in assessing the said shares for such year, to the several shareholders of the said plaintiff, and the method employed and used in fixing the value of other moneyed capital, for assessment purposes, and in assessing such moneyed capital in the hands of the certain State banking corporations, aforesaid, and of the shareholders in such State banking corporations, organized under the laws of the State of Montana, and coming into direct and immediate competition with the business of national banking corporations within the said State of Montana, and particularly with the business of this plaintiff bank, the tax for the year, 1925, imposed upon such shares of the capital stock of this plaintiff, by the State of Montana, and its political subdivisions, pursuant to such assessment, as herein alleged, was, and is, at a greater rate than is assessed upon other moneyed capital in the hands of certain state banking corporations, aforesaid, and of the several shareholders thereof, coming into competition with the business of this plaintiff, and was, and is, not uniform upon the same class of property within the State of Montana, and within Yellowstone County, Montana, as aforesaid;

XXI

That further, by reason of the foregoing, the pretended assessment for the year, 1925, made as hereinabove alleged, pursuant to Section 1999, subdivision 6, of the Revised Codes of Montana of 1921, and to Chapter 162, of Part III, of the Political Code, of the Revised Codes of Montana for

1921, by the said J. S. Simineo, as the County Assessor of the defendant County of Yellowstone, Montana, aforesaid, of the shares of the capital stock of the plaintiff bank, to the owners and the holders thereof above named, at the [fol. 19] value of $152,659.13, in the aggregate, was, and is, illegal and void, for the reasons following, to-wit:

(a) That the said assessment and the statutes and laws of the State of Montana, aforesaid, conflict with, and are contrary to, Section 5219 of the Revised Statutes of the United States, as amended by the Act of March 4, 1923, Chapter 267, 42 U. S. Statutes at Large, 1499, in that any tax levied and imposed by virtue of such assessment, or pursuant to such statutes and laws, upon the shares of the capital stock of the plaintiff, was, and is, at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State of Montana, coming into competition with the business of national banks, and particularly of this plaintiff, in the particulars and manner herein alleged;

(b) That the said assessment, and the statutes and laws of the State of Montana, aforesaid, conflict with, and are contrary to, the provisions of Section 11 of Article XII of the Constitution of the State of Montana, in that any tax levied and imposed by virtue of such assessment, or pursuant to such statutes and laws, upon the shares of the capital stock of the plaintiff, was, and is, not uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

(c) That the said assessment and the statutes and laws of the State of Montana, aforesaid, conflict with, and are contrary to, the Fourteenth Amendment to the Constitution of the United States, in that any tax levied and imposed pursuant to the said assessment, and the Statutes and laws of the State of Montana, aforesaid, deprives the plaintiff [fol. 20] and its said shareholders, of their property, without due process of law, and denies the said plaintiff, and its several shareholders above named, the equal protection of the law.

XXII

But that thereupon and thereafter, notwithstanding the premises, and in pursuance to, and in conformity with, the

pretended assessment aforesaid of the shares of the capital stock of the plaintiff bank, there was levied and imposed by the taxing officers of the defendant, County of Yellowstone, Montana, aforesaid, and entered upon the tax books of the said defendant County, a pretended tax, upon the shares aforesaid, of the said plaintiff, and against the owners and the holders of its capital stock, in the sum of $3,897.84; and that thereafter, the defendant, Henry S. Nutt, as County Treasurer of the said defendant, County of Yellowstone, Montana, demanded of the plaintiff payment of the said tax, or of fifty per centum (50%) thereof, on or before the 30th day of November, 1925, all pursuant to Section 2065 of the Revised Codes of Montana of 1921;

XXIII

That by reason of the premises herein alleged, and particularly of the reasons in Paragraph XXI hereof set forth, the shares of the capital stock of the plaintiff were not assessable or taxable during the year, 1925, to the several owners and holders thereof, above named, or to any of such owners or holders, in any sum whatsoever, or at all, under or pursuant to any law or statute of the State of Montana; that further, by reason thereof, no tax for the year, 1925, was due or demandable of or from said owners and holders [fol. 21] of the capital stock of this plaintiff, or of or from the plaintiff as the statutory agent of such shareholders, or of or from any or either of them, or at all, by virtue of any statute or law of the said State of Montana; and that the pretended tax, aforesaid, in the sum of $3,897.84, is levied and imposed upon the shares of the capital stock of the plaintiff bank, and demanded of this plaintiff on behalf of, and as the statutory agent of, the shareholders aforesaid, was, at all times herein mentioned, and now is, unlawful and void;

XXIV

That, nevertheless, on November 30, 1925, the said plaintiff, for and on behalf of its shareholders above named, pursuant to the compulsion of Section 2065 of the Revised Codes of Montana, of 1921, and to the demand, aforesaid, therefor, did pay to the said defendant, Henry S. Nutt, the County Treasurer of Yellowstone County, Montana, afore-

said, but under protest, as provided by Section 2269 of the Revised Codes of Montana of 1921, the sum of $1,948.92, the same being fifty per centum (50%) of the whole pretended tax, so levied and assessed as aforesaid, against the shareholders, aforesaid, on account of the capital stock of the plaintiff; and that the protest so made, was in writing and subscribed by the said plaintiff, The Montana National Bank of Billlings, with the grounds therein set forth, upon which the plaintiff bank and its several shareholders above named, deemed the said tax, and that portion thereof, so paid under protest, to be unlawful, illegal and void; that the grounds of the protest, aforesaid, therein set forth, [fol. 22] were, and are, the reasons for the unlawfulness and the illegality of the said tax, heretofore alleged in this complaint; and that such written protest, aforesaid, was delivered by this plaintiff, to the said defendant, Henry S. Nutt, as the County Treasurer of Yellowstone County, Montana, and was left with him, the said County Treasurer, at his office in the County of Yellowstone, Montana, aforesaid, at the time of the payment by this plaintiff on November 30, 1925, of fifty per centum (50%) of the said pretended tax and together therewith;

XXV

That now, within sixty (60) days from the 30th day of November, 1925, and within the time allowed by law therefor, the said plaintiff brings and files this action for the purpose of recovering that portion of such pretended tax, so paid under protest, as aforesaid, for and on behalf of the owners and holders of the several shares of its capital stock, in whose several names the payment of such tax under protest was made by this plaintiff, as hereinabove alleged, under compulsion of Section 2065 of the Revised Codes of Montana of 1921, and not otherwise.

Wherefore, the plaintiff prays judgment against the defendant, Yellowstone County, Montana, a municipal corporation, and Henry S. Nutt, as the Treasurer of Yellowstone County, Montana, for the sum of One Thousand Nine Hundred and Forty-eight and 92/100 Dollars ($1,948.92), together with interest thereon at the rate of eight per centum per annum (8%) from the 30th day of November,

1925, and its costs of suit herein expended, and all other [fol. 23] proper relief in the premises.

Grimstad, Brown & Davis, by Horace S. Davis, Attorneys for Plaintiff.

(Duly verified.)

(Original complaint filed January 29, 1926; amendments thereto made and filed March 8, 1926.)

Summons and sheriff's return thereto returned and filed February 6, 1927.

In District Court of Yellowstone County

Demurrer—Filed February 16, 1926

Comes now the above named defendants, Yellowstone County, of the State of Montana, a municpal corporation, and Henry S. Nutt, as County Treasurer of Yellowstone County, State of Montana, by and through John B. Tansil, County Attorney of Yellowstone County, Montana, and for their demurrer to plaintiff's complaint herein state and allege:

1. That said complaint does not state facts sufficient to constitute a cause of action against said defendants, or either of them.

John B. Tansil, County Attorney of Yellowstone County, Montana, and Attorney for Defendants.

Service of the within demurrer accepted and receipt of a copy thereof acknowledged this 16 day of February, 1926.

Grimstad & Brown, Attorneys for Plaintiff.

[fol. 24] In District Court of Yellowstone County

Order Sustaining Demurrer—Filed May 26, 1926

The defendants' demurrer to the plaintiff's complaint, as amended by its amendments filed March 8, 1926, was heretofore submitted to the court, and after due consideration the same is hereby sustained.

Dated this 26th day of May, 1926.

Robert C. Stong, Judge.

In District Court of Yellowstone County

Judgment—Filed June 28, 1926

On May 26, 1926, the demurrer of the defendants to plaintiff's complaint herein was sustained. The time within which plaintiff might file an amended complaint expired June 21, 1926. No amended complaint having been filed, and plaintiff having elected to stand upon its complaint herein,

It is ordered, adjudged and decreed that plaintiff take nothing by this action, and that the defendants do have and recover of and from the plaintiff their costs and disbursements herein incurred amounting to the sum of $—.

Done in open court this 28th day of June, 1926.

Robert C. Stong, Judge.

[fol. 25] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 26] In District Court of Yellowstone County

Minute Entries

May 7th, 1926.—The amendments to the complaint by the plaintiff is by the Court allowed. The demurrer of the defendant to the complaint is submitted to the Court on briefs and by the Court taken under advisement.

(Volume 16 of the Minute Book, page 334.)

May 26, 1926.—The defendants' demurrer to the plaintiff's complaint as amended was heretofore submitted to the Court, and after due consideration the Court sustains said demurrer.

(Volume 16 of the Minute Book, page 354.)

June 2nd, 1926.—The plaintiff herein granted until June 21st, 1926, to further plead.

(Volume 16 of the Minute Book, page 358.)

June 28th, 1926.—Defendants' demurrer to complaint having been sustained and time to file amended complaint having expired on June 21, 1926, and no amended complaint having been filed, and plaintiff having elected to stand upon its complaint herein, the Court orders that plaintiff take nothing by this action, and that defendants recover judgment from plaintiff for cost. Judgment is signed in open Court.

(Volume 16 of the Minute Book, page 396.)

[fol. 27] In District Court of Yellowstone County

Notice of Appeal—Filed July 27, 1926

To Yellowstone County of the State of Montana, a municipal corporation, and to Henry S. Natt, as County Treasurer of Yellowstone County, State of Montana, and to John R. Tansil, County Attorney of Yellowstone County, Montana, and to Leroy A. Foot, Attorney General of the State of Montana, and to the clerk of the above entitled court:

You, and each of you, will please take notice that The Montana National Bank of Billings, a national banking corporation, the plaintiff in the above entitled action, hereby appeals to the Supreme Court of the State of Montana, from that certain final judgment, and from the whole thereof, made, given, rendered and entered in the above entitled cause in and by the above named District Court on the 28th day of June, A. D. 1926, wherein and whereby it was ordered, adjudged and decreed that the said plaintiff take nothing by this action, and that the defendants do have and recover of and from the plaintiff their costs and disbursements incurred in such action amounting to the sum of — Dollars ($ —).

Dated July 27th, A. D. 1926.

Grimstad, Brown & Davis, by Horace S. Davis, Attorneys for Plaintiff.

[fols. 28-30] Personal service of the foregoing Notice of Appeal made and admitted and the receipt of a copy thereof acknowledged this 27th day of July, A. D. 1926.

John B. Tansil, County Attorney of Yellowstone County, Montana, by George S. Smith, Deputy County Attorney, Attorney for the Defendants.

Affidavit of service of foregoing notice omitted in printing.

[fols. 31 & 32] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] IN SUPREME COURT OF MONTANA

No. 6038

THE MONTANA NATIONAL BANK OF BILLINGS, a National Banking Corporation, Plaintiff and Appellant,

vs.

YELLOWSTONE COUNTY OF THE STATE OF MONTANA, a Municipal Corporation, and Henry S. Nutt, as County Treasurer of Yellowstone County, State of Montana, Defendants and respondents

Submitted December 6, 1926. Decided December 30, 1926. Filed December 30, 1926. J. W. Crosby, Clerk.

OPINION AND JUDGMENT

Mr. Chief Justice Callaway delivered the opinion of the Court.

The plaintiff brought this action in behalf of its stockholders against Yellowstone County and its treasurer to recover certain taxes, paid under protest, which were levied against the stockholders on account of their ownership of the capital stock of plaintiff, a national bank, during the year 1925. The plaintiff is capitalized at $100,000, divided into one thousand shares of the par value of $100 each. Upon the first Monday of March, 1925, plaintiff's surplus fund in addition to its capital stock was $50,000,

[fol. 34] and it had undivided profits to the amount of $2,659.15.

The plaintiff carries on a general banking business at Billings. Among its competitors in that city is the Security Trust and Savings Bank, a Montana corporation, which does a similar business. At various points throughout the State of Montana there are approximately 150 state banking corporations operating in competition with the plaintiff.

The net moneyed capital of the plaintiff which it employs in its banking business was on the day next preceding the first Monday of March, 1925, of the value of $129,463.49, including bonds and securities of the United States of the value of $101,671.25. In addition, it owned furniture and fixtures of the value of $23,195.64 but no real estate.

At the same time the net moneyed capital of the Security Trust & Savings Bank employed in its business was of the value of $51,894.47, not including Liberty Bonds and other securities of the United States of the value of $169,750 which it owned. It also owned furniture and fixtures of the value of $12,246.44 and real estate of the value of $62,375. Where the word "value" is used "full cash value" is meant.

On March 2, 1925, plaintiff, pursuant to section 2066, R. C. 1921, delivered to the assessor of Yellowstone County the required verified statement, disclosing the value of its capital stock to be in the aggregate $152,659.13 and of each share $152.66; thereupon, pursuant to the Classification Act (subd. 6 of section 1999 R. C. 1921) and the provisions [fol. 35] of Chapter 162, Part III of the Political Code, Revised Codes of 1921 (secs. 2063 to 2067, inclusive) the shares of the plaintiff were assessed to its stockholders for the year 1925 at the value of $152,659.13 in the aggregate and of $152.66 each, and without deduction in any manner from such value on account of the government securities owned by the plaintiff; in other words, the securities to the extent of $101,781.25, were included among the assets of the bank. The deduction of this item would have reduced the aggregate value of the capital stock of the bank to $50,877.88, or to a value of each share of $50.88. For the year 1925 the shares of the capital stock of the banking

corporations organized under the laws of Montana, including the Security Trust & Savings Bank, were not taxed at all but a tax was levied against the taxable property of these banks in accordance with the Classification Act. As illustrative, the moneyed capital of the Security bank was ascertained by deducting from the moneys and credits of the bank the amount of the deposits and any indebtedness representing money borrowed for its use. The government securities being exempt from taxation were not reckoned as a part of the moneyed capital, but on the contrary served to eliminate the moneyed capital ascertained as explained above; the bank wiped out the $51,894.47 by deducting therefrom a sufficient amount of the government securities, (East Helena State Bank v. Rogers , 73 Mont. 210, 236 Pac. 1090), leaving no moneyed capital subject to assessment. Thus the Security bank was assessed only upon its real estate and furniture and fixtures.

[fol. 36] Plaintiff alleges that upon the day next preceding the first Monday of March, 1925, the net moneyed capital of the 150 state banking corporations doing business in competition with the plaintiff was of the value of approximately $5,500,000, including government bonds and securities of the value of approximately $3,000,000. These banks were then the owners of furniture and fixtures of the value of approximately $2,100,000, and of real estate of the approximate value of $2,000,000. The value of the moneyed capital of all these banks for the purposes of taxation was arrived at in the same manner employed by the Security Trust & Savings Bank; all deducted from their moneys and securities the amount of their deposits and any indebtedness representing money borrowed for use in their business, and in addition thereto the value of their government bonds and securities.

Upon the first Monday of March, 1925, the shares of stock of the Security bank were of the aggregate cash value of $126,515.91, each share being of the value of $126.52. The plaintiff alleges that assessing the real estate, furniture and fixtures at $74,621.44 only was equivalent to a direct assessment of the shares of stock in that amount, which was $51,894.47 less than the true value thereof, and was the equivalent of an assessment of these shares directly to the shareholders at an aggregate value of $12,246.44 and of the real estate directly to the bank at $62,475,

and that such was the practice throughout Montana with respect to state banks. By reason of the difference between the method employed in fixing the value of the shares of the plaintiff for assessment purposes and the method followed in taxing state banks, the plaintiff alleges that the [fol. 37] tax for the year 1925 upon its capital stock was at a greater rate than is assessed upon other moneyed capital in the hands of the state banks and of their shareholders, who are direct competitors of the plaintiff, and further was not uniform upon the same class of property within the state or within Yellowstone County. The plaintiff therefore alleges that subsivision 6 of section 1999, supra, and Chapter 162, supra, and the assessments imposed thereunder, are illegal and void (a) because they conflict with section 5219 of the Revised Statutes of the United States as amended, in that any tax levied and imposed by virtue of such assessment, or pursuant to such statutes and laws, upon the shares of the capital stock of the plaintiff, is at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State of Montana, coming into competition with the business of national banks; (b) because they conflict with the provision of Section 11 of Article XII of the Constitution of Montana, in that any tax imposed by virtue of the assessment, or in pursuance of such statutes, upon the shares of plaintiff is not uniform upon the same class of subjects within the territorial limits of the authority levying the tax; and (c) because they conflict with the Fourteenth Amendment to the Constitution of the United States by serving to deprive the plaintiff and its shareholders of their property without due process of law, and deprive them of the equal protection of the law.

The defendants interposed a general demurrer to the complaint which was sustained, whereupon plaintiff suffered judgment to go against it and after entry thereof [fol. 38] appealed to this court.

"National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its con-

sent." (First National Bank of Guthrie Center v. Anderson, 70 L. Ed. 171.)

Section 5219 of the Revised Statutes of the United States, as amended by the Act of March 4, 1923, (Chap. 267, 42 Stat. at Large, 339) is applicable to the present controversy. (This section was again amended by Act approved March 25, 1926, but the last amendment does not affect this case.)

By this statute Congress has permitted the taxation of shares in national banks to their owners under the laws of the state where the bank is located, subject to the restriction that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of the individual citizens of such state." And has further assented to the taxation of the real property of the bank for state, county and municipal purposes "to the same extent, according to its value, as other real property is taxed."

"The purpose of the restriction is to render it impossible for any state, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks, by favoring shareholders in state banks or individuals interested in private banking or engaged in operations and investments normally common to the business of banking. [fol. 39] "Every clear discrimination against national bank shares and in favor of a relatively material part of other moneyed capital employed in substantial competition with national banks is a violation of both the letter and spirit of the restriction." (First National Bank of Guthrie Center v. Anderson, supra; Des Moines National Bank v. Fairweather, 263 U. S. 103, 68 L. Ed. 191, 44 Sup. Ct. Rep. 23, and cases cited.) In harmony are the following decisions of this court; Daly Bank & Trust Co. vs. Board of County Commissioners, 33 Mont. 101, 81 Pac. 950; Dennis vs. First National Bank, 55 Mont. 448, 178 Pac. 580; First National Bank of Glendive v. County of Dawson, 66 Mont. 321, 213 Pac. 1097; Commercial National Bank v. Custer County, 76 Mont. 45, 245 Pac. 259.

The tax permitted by Congress is not, except as to the real property, a tax upon the property of the bank. A tax on shares of a national bank is not a tax on its capital. The corporation is the legal owner of all the property of

bank. The interest of the shareholder is a distinct independent property, held by him like any other prop- that may belong to him. (First National Bank of ings v. Province, 20 Mont. 374; 51 Pac. 821, following Allen v. Assessors, 3 Wall. 573, 18 L. Ed. 229; Hawley ity of Malden, 232 U. S. 1, 58 L. Ed. 477, 34 Sup Ct. 201; Ann. Cas. 1916C, 842).

state may tax shares of national banks in the hands of kholders notwithstanding the capital of the bank is sted in government securities (Van Allen v. Assesors, a; Des Moines National Bank v. Fairweather, supra, cases cited).

40] "A tax upon the money of individuals, invested he form of shares of stock in national banks, would inish their value as an investment and drive the capital nvested from this employment, if at the same time lar investments and similar employments under the ority of state laws were exempt from an equal len." (Mercantile Bank v. New York, 121 U. S. 138, Ed. 895, 7 Sup. Ct. Rept., 826; Commercial National k v. Custer County, supra.)

he state is not obliged to apply the same system of tion to the shares of stock in national banks that it in the taxation of other property, providing there o injustice, inequality or unfriendly discrimination inst the national bank stock. (First National Bank of ndive v. County of Dawson, supra; Amoskeag Savings k v. Purdy, 231 U. S. 373, 58 L. Ed. 274, 34 Sup. Ct. 114).

axes, said the eminent Judge Cooley, are the enforced portional contributions from persons and property, ed by the state by virtue of its sovereignty for the sup- of government and for all public needs. "The citizen s from his profits the portion demanded, in order that, means thereof, he may be secured in the enjoyment of benefits of organized society." Through organized ety the citizen is enabled to enjoy the blessings of rty and the legitimate pursuit of happiness. He owes he state a duty to pay his just proportion toward the port of the government, and the state in turn" is sup- ed to make adequate and full compensation, in the pro-

tection which it gives to his life, liberty and property, and [fol. 41] in the increase to the value of his possessions, by the use to which the money contributed is applied." (Cooley on Taxation, (3rd Ed.), p. 3).

Our Constitution commands the taxation of all property, except that specially exempted. (Secs. 1, 2 Art. XII.) It is especially provided that "the power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on real and personal property owned or used by them and not by this Constitution exempted from taxation." (Sec. 7 Art. XII.) The evident meaning of this provision is that the property of the corporation shall bear its equal share of the burdens of taxation; and the provision of section 1 of Article XII that the legislature "shall prescribe such regulations as shall secure a just valuation for taxation of all property," applies to artificial as well as to natural persons. (Northwestern Mutual Life Ins. Co. vs. Lewis and Clarke County, 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572.)

"The word property, as used in this Article, is hereby declared to include moneys, credits, bonds, stock, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the state and has been taxed." (Sec. 17, Art. XII.)

[fol. 42] In Daly Bank & Trust Co. v. Board of Commissioners, 33 Mont. 101, 81 Pac. 950, this court commented upon the clarity of the section last quoted and continued: "To the extent that the capital stock is represented by property belonging to the state bank or trust company and which property is liable to taxation, to that extent the stock of that bank or trust company is not taxable. The real and personal property of a state bank or trust company is to be assessed as are the same kinds of property belonging to natural persons." (See also Union Bank & Trust Co. v. More, 62 Mont. 132; 204 Pac. 361.) Stocks of a state bank or trust company fall within the definition of the term "property," as given in section 17, supra, and

"are to be assessed to the owners at their full cash value, except to the extent that that value is represented in property which is assessed to the bank or trust company itself."

The foregoing construction of the constitutional provisions under consideration we now reaffirm.

Unquestionably it was the plain duty of the legislature to provide for the assessment and taxation of all the property of corporations situated within this state liable to taxation, and also the shares in the corporation insofar as the shares represent value which has not been taxed, and if the legislature has not done so, moneyed capital in the form of shares in state banking corporations is favored to the prejudice of moneyed capital invested in national bank stocks. (Van Allen v. Assessors, supra; Mercantile National Bank v. New York, supra; McHenry v. Downer, 116 Cal. 20, 47 Pac. 779; Marion National Bank v. Burton, 121 Ky. 876, 90 S. W. 944, 10 L. R. A. (N. S.) 947.)

It is true that the securities of the United States owned [fol. 43] by the bank may not be taxed, directly or indirectly. The state, powerless to do so without permission of the paramount power, may not tax the securities issued by the national government. (East Helena State Bank v. Rogers, supra.)

It stands admitted upon the record that the shares of stock in the Security Trust & Savings Bank have a value over and above the taxable real and personal property of the corporation to the extent of $51,894.47. It matters not that Liberty Bonds and other government securities go to make up that value. These are the property of the bank, not of the stockholders. The shares have a distinct value of their own." (Des Moines National Bank v. Fairweather, supra). To the extent that this value exceeds the value of the taxable real and personal property of the corporation the stock is taxable. The taxability of these shares is undubitable in the light of section 17 of Article XII of the Constitution. That this section, as we said in State ex rel. Rankin v. Harrington, 68 Mont. 1, 217 Pac. 681, "gives affirmative recognition to the policy that shares of stock may have an independent status for the purpose of taxation is too clear to admit of discussion and that such shares if within this state, whether belonging to residents or nonresidents are proper subjects of taxation is beyond question."

But it is urged that in the light of our legislative history respecting the taxation of bank stock it must be held that the legislature in effect has relieved the stocks of state banking corporations from taxation. If the legislature has done so it has proceeded in the very teeth of the Constitu- [fol. 44] tion. The argument has the following insecure basis: The second legislature assembly passed an Act concerning revenue and this was the first enactment upon the subject following the adoption of the Constitution. (Laws of 1891, pp. 73 et seq.) Section 6 of the Act provides in part that the stockholders in every bank or banking association organized under the authority of this state or the United States must be assessed and taxed on the value of their shares of stock therein, in the county, town, city or district where such bank or banking association is located and not elsewhere, whether such stockholders reside in such place or not. The remainder of the section and sections 7 and 8 contain procedural directions with respect to the assessment. Section 7 provides that in the assessment of the shares of stock mentioned in the next preceding section each stockholder must be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable property owned by individual citizens of this state, and the assessment and taxation must not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state. Without change these sections were reenacted as sections 3691, 3692 and 3693 of the Political Code of 1895, and went into the Revised Codes of 1907 as sections 2503, 2504 and 2505.

There appeared in the Civil Code of 1895 section 585 which provided that "banks incorporated under the provisions of this title shall be taxed as national banks are, the stock to pay its shares of the revenue, whether held in the state or not." Section 611, being a part of the chapter re- [fol. 45] lating to trust, deposit and security and savings bank corporations, reads as follows: "The property of the corporations organized under this Act shall be assessed for taxes in the same manner as the property of national banks and no other." These sections were carried into the Revised Codes of 1907 as sections 3922 and 3944. In the meantime by decision promulgated July 29, 1905, this court in

Daly Bank & Trust Co. v. Board of County Commissioners, supra, had declared section 611 of the Civil Code unconstitutional by reason of the fact that it attempted in effect to exempt the personal property of a state bank or trust company from taxation,—the personal property of a national bank being thus exempt. Nothing appears to have been done to remedy the situation until 1915, when the Fourteenth Legislative Assembly enacted Chapter 31 (Session Laws of 1915, p. 45). A review of this Act would not be useful. It is enough to say that it sought to place the shares of stock in state and national banks and banking corporations upon an equality.

The Classification Act was passed in 1919, (Ch. 51, Session Laws of 1919, p. 112). Class Six in section 1, now section 1999, R. C. 1921, provides: "For the purpose of taxation the taxable property in this state shall be classified as follows: Class Six: The shares of stock of national banking associations and the moneyed capital employed in conducting a banking business by any other banking corporation, association or individual in this state. Such money capital to be ascertained by deducting from the moneys and credits of such banking corporation, association, or individual, the amount of the deposits and any in- [fol. 46] debtedness representing money borrowed for use in said business, and the value of the shares of any national banking association, to be ascertained by deducting the value of all real estate of such association."

The Seventeenth Legislative Assembly, at its regular session, perceiving that Chapter 31 of the 1915 Session Laws was of doubtful validity, and desiring to conform to the provisions of the Classification Law, repealed Chapter 31 and enacted a law which is known as Chapter 81 (Session laws of 1921, p. 72) relating to the assessment of stock in banking corporations, national and state. This Act contains provisions respecting the assessment and taxation of all shares of stock in national banks, as well as provisions for taxing the property of state banking corporations in accordance with the provisions of the Classification Law. No mention is made of shares of stock in state banks. It is by reason of this omission that the plaintiff argues that it was the design of the legislative assembly to exempt shares in state banks from taxation. With this argument we can-

not agree. Since the adoption of our state Constitution the solicitous design of our legislative department has been to avoid such discrimination.

As we have seen, it was pointed out in the Daly Bank case that the policy of taxing shares in state banks as shares in national banks are taxed, permitted the personal property of state banks to escape taxation, which was in direct contravention of our Constitution. In order to clear up a misapprehension it is now necessary to take note of the fact that the force of that case was overlooked in East Helena State Bank v. Rogers, supra. This oversight con- [fol. 47] tributed to the manifest error into which the court fell in making use of the following expressions in the latter case: "This state had the option to tax the shares of stock in state banks to the individual shareholders or to tax the property of such banks to the banks themselves. It could not tax both at the same time. (Sec. 16, Article XII, Constitution of Montana.) If it had chosen the first alternative it might then have assessed the shares at their full cash value without reference to the character of the securities in which the bank's funds were invested". The foregoing statements in the opinion of the East Helena State Bank case are now expressly disapproved.

By the Constitution the state is commanded to tax the property of the banks—the corporations—and also the shares if they have a value independent of the taxable property of the bank. It cannot tax the property to the banks and at the same time tax the shares to the extent that the property is taxed, but it can tax the property, and also the shares to the extent that they have a value above and beyond the property of the bank which has been taxed. And it may tax the shares to that extent without reference to the character of the securities which go to make up the value which the shares have over and above the taxable property of the bank. (Van Allen v. Assessors, supra; People v. Commissioners of Taxes, 4 Wall. 244, 18 L. Ed. 344; Home State Bank v. Des Moines, 205 U. S. 503, 51 L. Ed. 901, 27 Sup. Ct. Rep. 571; Cleveland Trust Co. v. Lander, 184 U. S. 114, 46 L. Ed. 458, 22 Sup. Ct. Rep. 395.)

The shares of the Security Bank & Trust Company were not taxed for the year 1925, but was the failure to tax be- [fol. 48] cause of an unfriendly discrimination by act of

the Legislative department or through a misconception of the law on part of the officers of the state and county who are charged with the execution of the laws?

Sections 1997 and 1998, R. C. 1921, provide that all property in this state is subject to taxation, with certain exemptions, consistently with sections 1 and 2 of Article XII of the Constitution. Subdivision first of section 1996 provides that the term "property" includes moneys, credits, bonds, stocks, franchises and other matters and things real, personal, and mixed, capable of private ownership. "All taxable property must be assessed at its full cash value." (Sec. 2001, R. C. 1921). The assessor must assess the property subject to taxation to the persons by whom it was owned or claimed, or in whose possession or control it was at 12 o'clock noon of the first Monday of March next preceding. (Sec. 2002). The assessor must require from each person a statement under oath setting forth specifically all the real and personal property owned by such person or in his possession or under his control at 12 o'clock noon of the first Monday of March. (Sec. 2003). The assessor has power to subpœna and examine any person in relation to any statement furnished to him or which discloses property which is assessable in his county, and he may exercise this power in any county where the person whom he desires to examine may be found. (Sec. 2006). If any person after demand made by the assessor, neglects or refuses to give under oath the statement provided for, or to comply with the other lawful requirements of the assessor that officer must note the refusal on the assess-[fol. 49] ment book opposite the name of the person and must make an estimate of the value of that person's property, and the value so fixed by the assessor must not be reduced by the board of county commissioners. (Sec. 2007).

"The capital stock and franchises of corporations and persons, except as otherwise provided, must be listed and taxed in the county, town, or district where the principal office or place of business of such corporation or person is located; if there be no principal office or place of business in the state then at the place in the state where any such corporation or person transacts business. (Sec. 2015).

The assessor of Yellowstone county possessed the authority to require each owner of shares of stock in the Security Trust & Savings Bank within his county, to disclose his ownership thereof, and to assess the stock at its full cash value, except to the extent that that value then was represented in property then assessed to the bank. The presumption is that these owners will answer the assessor's inquiries truly. Doubtless the legislative assembly with propriety might provide additional machinery to aid the assessor in the matter of the assessment of the shares of stock owned by residents, as well as non-residents, of the state.

It follows that it was not by authority of law that the taxing officers omitted the taxation of the shares of the Security bank. The law did not authorize the omission of these shares from taxation and their taxability in the instant case must be admitted.

Nor is there anything in the record to indicate that the [fol. 50] same conditions apparent here do not apply to shares of stock in the other state banks mentioned in plaintiff's complaint.

It is clear, then, from an examination of the legislative enactments of this state, and from the decisions of this court construing the same, that the policy of this state has not been to evince an unfriendly discrimination against investments in national bank shares, but on the contrary the state by its laws has provided for the taxation of moneyed capital invested in state banks at the same rate as money invested in the shares of national banks. By direction of Section 2000, R. C. 1921, as a basis for the imposition of taxes a percentage of the true and full value of the property in Class Six, section 1999, supra, is "forty per cent of its true and full value." The same percentage is applicable to shares of stock in state banking corporations representing moneyed capital employed in the banking business.

Plaintiff's complaint is directed against the taxing system of the state with respect to the subjects under consideration rather than against the manner in which the taxing authorities have construed and executed the laws. In other words, the attack is upon the law rather than upon its administration. In this court plaintiff has pursued

that theory both in oral and written argument. But a tax law cannot be held invalid for want of equality and uniformity because inequality or lack of uniformity results from the error or misconduct of the officers charged with the imposition or collection of the tax. (Cooley on Taxation, 4th ed. sec. 266; Cummings v. Merchants National [fol. 51] Bank of Toledo, 101 U. S. 154, 25 L. Ed. 903). Neither of plaintiff's objections is tenable.

The judgment is affirmed.

Affirmed.

Lew L. Callaway, Chief Justice.

We concur: Albert J. Galen, Albert P. Stark, John A. Mathews, Associate Justices.

[fol. 52] IN SUPREME COURT OF MONTANA

PETITION FOR WRIT OF ERROR—Filed March 3, 1927

To the Honorable Lew L. Callaway, Chief Justice of the Supreme Court of the State of Montana:

The petition of The Montana National Bank of Billings, a national banking corporation, the plaintiff and appellant herein, by M. S. Gunn, Esquire, and Brown, Wiggenhorn & Davis, Esquires, its attorneys, hereby respectfully sets forth and shows as follows:

That on the 30th day of December, 1926, the Supreme Court of the State of Montana duly gave, made and entered a final decision and judgment in the above entitled cause, in favor of Yellowstone County of the State of Montana, a municipal corporation, and Henry S. Nutt, as County Treasurer of Yellowstone County, State of Montana, the defendants and respondents therein, and against The Montana National Bank of Billings, a national banking corporation, the plaintiff and appellant therein; and that in and by such final decision and judgment and in the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of your petitioner The Montana National Bank of Billings, a national banking

corporation, plaintiff and appellant as aforesaid, all of which will more in detail appear from and be made manifest by the assignment of errors of your petitioner which is filed in the said cause with this petition and which is expressly made a part hereof by reference as though set [fol. 53] out at length herein.

That the said Supreme Court of the State of Montana is the highest court of the said State of Montana in which a decision and judgment in this cause and matter can be had.

Wherefore, feeling itself aggrieved by the final decision and judgment aforesaid, your petitioner, The Montana National Bank of Billings, a national banking corporation, plaintiff and appellant herein, respectfully prays and petitions that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Montana for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States pursuant to law, and with all further appropriate relief in the premises.

Dated this 3rd day of March, 1927.

M. S. Gunn and Brown, Wiggenhorn & Davis, by Horace S. Davis, Attorneys for the Montana National Bank of Billings, a National Banking Corporation, Plaintiff in Error.

[fol. 54] In Supreme Court of Montana

Assignments of Error—Filed March 3, 1927

Comes now the plaintiff and appellant, The Montana National Bank of Billings, a national banking corporation, as petitioner in error, and presents and files herein with its petition for a writ of error in said cause its assignment of errors as follows:

1. The Supreme Court of the State of Montana erred in finding, holding and deciding that the system of taxation of shares of national banking associations as provided for by Sections 1999, 2000 and 2063 to 2067, inclusive, of the

Revised Codes of Montana, 1921, and the tax authorized to be imposed thereby, is not at a greater rate than that which is assessed upon other moneyed capital in the hands of individual citizens of the State of Montana, coming into competition with the business of national banks, and particularly upon such moneyed capital, consisting of shares of the capital stock of the Security Trust & Savings Bank and other state banking corporations in the hands of individual citizens of the State of Montana, coming into direct and immediate competition with the business of the plaintiff and appellant and of other national banks.

2. The Supreme Court of the State of Montana erred in finding, holding and deciding that Sections 1999, 2000 and 2063 to 2067, inclusive, of the Revised Codes of Montana, 1921, and the tax authorized to be imposed thereby upon the shares of national banking associations, are not repugnant to, and in conflict with, the provisions of section 5219 [fol. 55] of the Revised Statutes of the United States, as amended by the Act of Congress of March 4, 1923 (Ch. 267, 42 Stat. L. 1499) both before and after the further amendment by the Act of Congress of March 25, 1926.

3. The Supreme Court of the State of Montana erred in finding, holding and deciding that the system of taxation of shares of national banking associations as provided for by Sections 1999, 2000, and 2063 to 2067, inclusive, of the Revised Codes of Montana, 1921, and as interpreted and expounded by the opinion of the Supreme Court of the State of Montana, rendered April 20, 1925, in the case of East Helena State Bank, respondent, versus Leslie M. Rogers, County Treasurer, appellant, reported in 73 Montana 210, 236 Pacific 1090, and the tax authorized to be imposed thereby in accordance with such statutes and opinion, are not at a greater rate than that which is assessed upon other moneyed capital in the hands of individual citizens of the State of Montana, coming into competition with the business of national banks, and particularly upon moneyed capital consisting of shares of the capital stock of the Security Trust & Savings Bank, and other state banking corporations in the hands of individual citizens of the State of Montana, coming into direct and immediate competition with the business of the plaintiff and appellant and of other national banks.

4. The Supreme Court of the State of Montana erred in finding, holding and deciding that sections 1999, 2000, and 2063 to 2067 inclusive, of the Revised Codes of Montana, 1921, are not repugnant to, and in conflict with, the [fol. 56] Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of the State of Montana erred in finding, holding and deciding that the want of equality and uniformity appearing in this case between the taxes imposed by the State of Montana upon the shares of national banking associations and the taxes imposed upon other moneyed capital consisting of shares of the capital stock of the Security Trust & Savings Bank and other state banking corporations, in the hands of individual citizens of the State of Montana, coming into competition with the business of the plaintiff and appellant and of other national banks results from the error of the officers charged with the collection and imposition of taxes in interpreting and applying the law of Montana relative to the taxation of shares in state banking corporations.

6. The Supreme Court of the State of Montana erred in finding, holding and deciding that the taxation by the State of Montana of shares of national banking associations at a greater rate than that which is assessed upon other moneyed capital consisting of shares of the capital stock of the Security Trust & Savings Bank and other state banking corporations in the hands of individual citizens of the State of Montana coming into direct and immediate competition with the business of the plaintiff and appellant and of other national banks, but which results from a misconception of the law on the part of the officers charged with the imposition and collection of taxes, is nevertheless valid and does not conflict with section 5219 of the Revised Statutes of the United States, as amended [fol. 57] by the Act of Congress of March 4, 1923, both before and after the further amendment by the Act of Congress of March 25, 1926, and/or the Fourteenth Amendment to the Constitution of the United States.

7. The Supreme Court of the State of Montana erred in failing and refusing to reverse the judgment of the District Court of the Thirteenth Judicial District of the State

of Montana in and for the County of Yellowstone rendered in this cause, and in failing and refusing to remand the said cause to the District Court aforesaid with directions to overrule the demurrer of the defendants to the amended complaint of the plaintiff and appellant.

8. The Supreme Court of the State of Montana erred in rendering judgment in this cause in favor of the said defendants and respondents and against the plaintiff and appellant herein.

Wherefore, the plaintiff and appellant prays that the judgment aforesaid in the above entitled cause be reversed, with all other proper and adequate relief in the premises.

M. S. Gunn and Brown, Wiggenhorn & Davis, by Horace S. Davis, Attorneys for Plaintiff and Appellant.

[fol. 58] IN SUPREME COURT OF MONTANA

ORDER ALLOWING WRIT OF ERROR—Filed March 3, 1927

The above entitled matter coming on this day to be heard upon the petition of the plaintiff and appellant therein set for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Montana, now upon examination of the said petition and of the assignment of errors of such petitioner filed and presented therewith, and desiring to give the said petitioner an opportunity to present in the Supreme Court of the United States the questions made by the record in the said cause:

It is ordered that a writ of error be, and the same is hereby, allowed to the Supreme Court of the State of Montana, from the Supreme Court of the United States; that the amount of the bond on such writ of error be, and the same is hereby, fixed in the sum of one thousand dollars ($1,000.00); and that such bond when filed and approved, shall act as a supersedeas in the premises.

Dated March 3d, 1927.

Lewellyn L. Callaway, Chief Justice of the Supreme Court of the State of Montana.

[fols. 59-62] Bond on writ of error for $1,000, approved and filed March 3, 1927, omitted in printing.

[fol. 63] IN SUPREME COURT OF MONTANA

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed March 3, 1927

To J. W. Crosby, Esquire, Clerk of the Supreme Court of the State of Montana:

You will please prepare forthwith and certify up to the Supreme Court of the United States a Transcript of the following parts and portions of the record and proceedings in the above entitled cause, to-wit:

Transcript on Appeal in the said cause, containing the amended complaint, the demurrer thereto, the order of the court thereon, the judgment of the lower court, the notice of appeal to the Supreme Court of the State of Montana, and the certificate of the clerk of the lower court to such Transcript.

The Judgment and opinion in full of the Supreme Court of the State of Montana, rendered on December 30th, 1926, affirming the judgment of the lower court.

Petition for writ of error.

Plaintiff in error's assignment of errors.

Order allowing writ of error and fixing bond thereon.

Bond on writ of error.

Dated this 3rd day of March, 1927.

M. S. Gunn and Brown, Wiggenhorn & Davis, by Horace S. Davis, Attorneys for Plaintiff in Error.

Due and timely and personal service of the within and foregoing prœcipe made and admitted, and the receipt of [fol. 64] a copy thereof and acknowledged this 3rd day of March, 1927.

L. A. Foot, Attorney General of the State of Montana, by A. H. Angstman, Assistant Attorney General.

[fols. 65 & 66] Citation, in usual form, showing service on L. A. Foot and A. H. Angstman, omitted in printing.

[fol. 67] IN SUPREME COURT OF MONTANA

[Title omitted]

WRIT OF ERROR

THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment on a plea which is in the said Supreme Court of the State of Montana before you between The Montana National Bank of Billings, a national banking corporation, plaintiff and appellant, and Yellowstone County of the State of Montana, a municipal corporation, and Henry S. Nutt, as County Treasurer of Yellowstone County, State of Montana, defendants and respondents, wherein was drawn in question the validity of certain statutes of the said State of Montana on the ground of their being repugnant to the laws of the United States and the decision was in favor of their validity, a manifest error hath happened to the great damage of the said The Montana National Bank of Billings, a national banking [fol. 68] corporation, the plaintiff and appellant aforesaid, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court of the United States at the City of Washington, D. C., within sixty days from the date hereof, that the records and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, the Chief Justice of the United States, this 3rd day of March, 1927.

C. R. Gaslow, Clerk of the District Court of the United States for the District of Montana, by Mae O'Donnell, Deputy Clerk. (Seal United States District Court, District of Montana.)

The foregoing Writ of Error allowed this third day of March, 1927.

Llewellyn L. Callaway, Chief Justice of the Supreme Court of the State of Montana.

[fol. 69] Return to writ of error omitted in printing.

[fols. 70 & 71] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 72] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY PLAINTIFF IN ERROR TO PRINT THE ENTIRE RECORD—Filed March 28, 1927

The Transcript of the record in the above entitled action having been duly filed in said cause, the plaintiff in error now makes the following statement of the points on which it intends to rely and designates the parts of the record herein which it deems necessary for the consideration thereof, to-wit:

1

Statement of Points to be Relied Upon

1. That the Supreme Court of the State of Montana, erred in finding, holding and deciding that the system of taxation of the shares of national banking associations as provided for by sections 1999, 2000 and 2063 to 2067, inclusive, of the Revised Codes of Montana, 1921, and the taxes authorized to be imposed thereby, are not at a

greater rate than that which is assessed upon other moneyed capital in the hands of individual citizens of the [fol. 73] State of Montana, coming into competition with the business of national banks, and particularly upon such moneyed capital, coming into direct and immediate competition with the business of the plaintiff in error and of other national banks in the State of Montana, which consists of shares of the capital stock of the Security Trust & Savings Bank and of other state banking corporations.

2

The Supreme Court of the State of Montana erred in finding, holding and deciding that sections 1999, 2000 and 2063 to 2067, inclusive, of the Revised Codes of Montana, 1921, and the taxes authorized to be imposed thereby upon the shares of national banking associations, are not repugnant to, and in conflict with, the provisions of section 5219 of the Revised Statutes of the United States, as amended by the Act of Congress of March 4th, 1923 (Ch. 267, 42 Stat. L. 1499), both before and after the further amendment by the Act of Congress of March 25th, 1926.

3

The Supreme Court of the State of Montana erred in finding, holding and deciding that the system of taxation of shares of national banking associations as provided for by sections 1999, 2000 and 2063 to 2067, inclusive, of the Revised Codes of Montana, 1921, and as interpreted and expounded by the opinion of the Supreme Court of the State of Montana, rendered April 20th, 1925, in the case of East Helena State Bank, respondent, versus Leslie M. Rogers, County Treasurer, appellant, reported in 73 Montana, 210, 236 Pacific 1090, and the tax authorized to be imposed thereby in accordance with such statutes and opinion, [fol. 74] are not at a greater rate than that which is assessed upon other moneyed capital in the hands of individual citizens of the State of Montana coming into competition with the business of national banks, particularly upon such moneyed capital, coming into direct and immediate competition with the business of the plaintiff in error and of

other national banks in the State of Montana which consists of shares of the capital stock of the Security Trust & Savings Bank and of other state banking corporations in the hands of the individual citizens of the State of Montana.

4

The Supreme Court of the State of Montana erred in finding, holding and deciding that sections 1999, 2000 and 2063 to 2067, inclusive, of the Revised Codes of Montana, 1921, are not repugnant to, and in conflict with, the Fourteenth Amendment to the Constitution of the United States.

5

The Supreme Court of the State of Montana erred in finding, holding and deciding that the want of equality and uniformity appearing in this case between the taxes imposed by the State of Montana upon the shares of national banking associations and the taxes imposed upon other moneyed capital consisting of shares of the capital stock of the Security Trust & Savings Bank and other state banking corporations, in the hands of individual citizens of the State of Montana, coming into competition with the business of the plaintiff in error and of other national banks results from the error of the officers charged with the collection and imposition of taxes in interpreting and [fol. 75] applying the law of Montana relative to the taxation of shares in State banking corporations.

6

The Supreme Court of the State of Montana erred in finding, holding and deciding that the taxation by the State of Montana of shares of national banking associations at a greater rate than that which is assessed upon other moneyed capital consisting of shares of the capital stock of the Security Trust & Savings Bank and other state banking corporations in the hands of individual citizens of the State of Montana coming into direct and immediate competition with the business of the plaintiff in error and of other national banks, but which results from a mis-conception of the law on the part of the officers charged with the

imposition and collection of taxes, is nevertheless valid and does not conflict with sections 5219 of the Revised Statutes of the United States, as amended by the Act of Congress of March 4th, 1923, both before and after the further amendment by the Act of Congress of March 25th, 1926, and/or the Fourteenth Amendment to the Constitution of the United States.

7

The Supreme Court of the State of Montana erred in failing and refusing to reverse the judgment of the District Court of the Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone rendered in this cause, and in failing and refusing to remand the said cause to the District Court aforesaid with directions to overrule the demurrer of the defendants in error to the amended complaint of the plaintiff in error.

[fol. 76] 8

The Supreme Court of the State of Montana erred in rendering judgment in this cause in favor of the said defendants in error and against the plaintiff in error herein.

II

Designation of Parts of the Record to be Printed

The plaintiff in error deems it necessary for the proper consideration of the foregoing points specified above, and therefore designate that the entire record as filed herein be printed in this Court as follows, to-wit:

The Transcript on Appeal as filed in the Supreme Court of the State of Montana.

The Judgment and Opinion of the Supreme Court of the State of Montana in this cause, rendered on December 30th, 1926, affirming the judgment of the lower court.

The Petition for Writ of Error herein.

The plaintiff in error's Assignment of Errors.

The Order Allowing the Writ of Error and fixing the bond thereon.

The Bond on Writ of Error.

The Præcipe of the plaintiff in error to the Clerk of the Supreme Court of the State of Montana requesting the preparation and transmission of the record herein.

The Writ of Error.

The Certificate of the Clerk of the Supreme Court of the State of Montana to the record, and the return of the clerk to the Writ of Error aforesaid.

Dated March 22nd, 1927.

M. S. Simmons, Horace S. Davis, Attorneys for Plaintiff in Error.

[fols. 77 & 78] Due, timely and personal service of the foregoing Statement of Points to be Relied upon and Designation by Plaintiff in Error to Print the Entire Record made and admitted and the receipt of a true and correct copy thereof acknowledged this 22nd day of March, 1927.

L. A. Foot, Attorney General, by A. H. Angstman, Assistant Attorney General.

[fol. 79] [File endorsement omitted.]

Endorsed on cover: File No. 32,571. Montana Supreme Court. Term No. 1004. The Montana National Bank of Billings, plaintiff in error, vs. Yellowstone County of the State of Montana and Henry S. Nutt, as County Treasurer, etc. Filed March 28th, 1927. File No. 32,571.

DEC 30 1927
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1927

No. 207

THE MONTANA NATIONAL BANK OF BILLINGS,

Plaintiff in Error.

vs.

YELLOWSTONE COUNTY OF THE STATE OF MONTANA AND HENRY S. NUTT, AS COUNTY TREASURER, ETC.,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

M. S. GUNN.
ROCKWOOD BROWN.
R. G. WIGGENHORN,
HORACE S. DAVIS,

Attorneys for Plaintiff in Error.

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Supreme Court of the United States

OCTOBER TERM, 1927

No. 207

THE MONTANA NATIONAL BANK OF BILLINGS,

Plaintiff in Error.

vs.

YELLOWSTONE COUNTY OF THE STATE OF MONTANA AND HENRY S. NUTT, AS COUNTY TREASURER, ETC.,

Defendants in Error.

STATEMENT OF THE CASE

The plaintiff in error is a banking corporation incorporated under the National Banking Act and doing business as such at Billings, Yellowstone County, Montana. Pursuant to the laws of the State of Montana a tax was levied upon the shares of the capital stock of the plaintiff in error against the individual owners for the year 1925, amounting to $3897.84. One half of this sum was payable on or before

November 30th, 1925, and was so paid under protest. Thereafter suit was brought in the District Court of Yellowstone County, Montana, for the recovery of the taxes thus paid. The demurrer of the defendants in error to the amended complaint of The Montana National Bank of Billings in whose name the suit was brought on behalf of its stockholders was sustained and thereafter judgment of dismissal entered against the bank. (R. 17-18) From this judgment an appeal was prosecuted to the Supreme Court of the State of Montana wherein the judgment of the lower court was affirmed by decision rendered December 30th, 1926. (R. 20-33)

The case is before this Court on writ of error to the Supreme Court of the State of Montana (R. 39-40) to review the final judgment of that court of December 30th, 1926, affirming the judgment of dismissal entered in the lower court. The plaintiff in error in its assignments of error contends that the scheme of taxation provided by the statutes of Montana, as interpreted and applied by the opinions of its Supreme Court, imposed a higher rate of taxation upon the shares of national banks than was borne by other moneyed capital in the hands of individual citizens of Montana, coming into direct and immediate competition with the business of national banks, and particularly of the plaintiff in error, represented by the shares of stock in some one hundred and fifty banking corporations organized and existing under the authority of the state law. By reason of such discrimination the plaintiff in error asserts that the tax levied upon its shares of stock for 1925 pursuant to this system of taxation is illegal and void in that it is in conflict with and in violation of the provisions of Section 5219, United States Revised Statutes, as amended by the Act of Congress of March 4th, 1923, Chap. 267, 42 Stat. at L. 1499.

The opinion rendered in this case in the Supreme Court

of the State of Montana is officially reported as follows:

Montana National Bank of Billings, appellant, v. Yellowstone County, et al., respondents, 78 Montana 62.

JURISDICTION

The jurisdiction of this court is found in Section 237 of the United States Judicial Code, as amended by the Act of Congress of February 13th, 1925, Chap. 229, 43 Stat. at L. 936, and is sustained by the decisions of this Court in the following cases:

Commercial National Bank of Miles City, Montana, and W. M. Turner, Receiver, etc. vs. Custer County, et al., decided December 5th, 1927, and not yet officially reported.

W. M. Turner, Receiver, etc. et al. vs. Custer County, et al., decided December 5th, 1927, and not yet officially reported.

Miles City National Bank of Miles City, vs. Custer County, et al., decided December 5th, 1927, and not yet officially reported.

First National Bank of Guthrie Center vs. Anderson, 269 U. S. 341.

Merchants National Bank vs. Richmond, 256 U. S. 635-637.

ASSIGNMENTS OF ERROR

I.

The Supreme Court of the State of Montana erred in finding, holding and deciding that the system of taxation of shares of national banking associations as provided for by Sections 1999, 2000 and 2063 to 2067, inclusive, of the Revised Codes of Montana, 1921, and the tax authorized to be imposed thereby, is not at a greater rate than that

which is assessed upon other moneyed capital in the hands of individual citizens of the State of Montana, coming into competition with the business of national banks and particularly upon such moneyed capital, consisting of shares of the capital stock of the Security Trust & Savings Bank and other state banking corporations in the hands of individual citizens of the State of Montana, coming into direct and immediate competition with the business of the plaintiff and appellant and of other national banks.

II.

The Supreme Court of the State of Montana erred in finding, holding and deciding that Sections 1999, 2000 and 2063 to 2067, inclusive, of the Revised Codes of Montana, 1921, and the tax authorized to be imposed thereby upon the shares of national banking associations, are not repugnant to, and in conflict with, the provisions of section 5219 f the Revised Statutes of the United States, as amended by the Act of Congress of March 4th, 1923 (Ch. 267, 42 Stat. at L. 1499) both before and after the further amendment by the Act of Congress of March 25, 1926.

III.

The Supreme Court of the State of Montana erred in finding, holding and deciding that the system of taxation of shares of national banking associations as provided for by Sections 1999, 2000 and 2063 to 2067, inclusive, of the Revised Codes of Montana, 1921, and as interpreted and expounded by the opinion of the Supreme Court of the State of Montana, rendered April 20, 1925, in the case of East Helena State Bank, respondent versus Leslie M. Rogers, County Treasurer, appellant, reported in 73 Montana 210, 236 Pacific 1090, and the tax authorized to be imposed thereby in accordance with such statutes and opinion, are not at a

greater rate than that which is assessed upon other moneyed capital in the hands of individual citizens of the State of Montana, coming into competition with the business of naional banks, and particularly upon moneyed capital consisting of shares of the capital stock of the Security Trust & Savings Bank, and other state banking corporations in the hands of individual citizens of the State of Montana, coming into direct and immediate competition with the business of the plaintiff and appellant and of other national banks.

IV.

The Supreme Court of the State of Montana erred in finding, holding and deciding that sections 1999, 2000 and 2063 to 2067, inclusive, of the Revised Codes of Montana, 1921, are not repugnant to, and in conflict with, the Fourteenth Amendment to the Constitution of the United States.

V.

The Supreme Court of the State of Montana erred in finding, holding and deciding that the want of equality and uniformity appearing in this case between the taxes imposed by the State of Montana upon the shares of the national banking associations and the taxes imposed upon other moneyed capital consisting of shares of the capital stock of the Security Trust & Savings Bank and other state banking corporations, in the hands of individual citizens of the State of Montana coming into competition with the business of the plaintiff and appellant and of other national banks results from the error of the officers charged with the collection and imposition of taxes in interpreting and applying the law of Montana relative to the taxation of shares in state banking corporations.

VI.

The Supreme Court of the State of Montana erred in finding, holding and deciding that the taxation by the State of Montana of shares of national banking associations at a greater rate than that which is assessed upon other moneyed capital consisting of shares of the capital stock of the Security Trust & Savings Bank and other state banking corporations in the hands of individual citizens of the State of Montana coming into direct and immediate competition with the business of the plaintiff and appellant and of other national banks, but which results from a misconception of the law on the part of the officers charged with the imposition and collection of taxes, is nevertheless valid and does not conflict with section 5219 of the Revised Statutes of the United States, as amended by the Act of Congress of March 4, 1923, both before and after the further amendment by the Act of Congress of March 25, 1926, and/or the Fourteenth Amendment to the Constitution of the United States.

VII.

The Supreme Court of the State of Montana erred in failing and refusing to reverse the judgment of the District Court of the Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone rendered in this cause, and in failing and refusing to remand the said cause to the District Court aforesaid with directions to overrule the demurrer of the defendants to the amended complaint of the plaintiff and appellant.

VIII.

The Supreme Court of the State of Montana erred in rendering judgment in this cause in favor of the said defendants and respondents and against the plaintiff and appellant herein.

ARGUMENT

I.

STATEMENT

As a preface to the discussion of the various assignments of error we shall first state briefly the salient facts of the case made in the record with reference to the statutes of the State of Montana and the opinion of its Supreme Court construing these statutes upon the authority of which the tax complained of here was levied.

The facts of the case, admitted by demurrer (R. 17), appear from the amended complaint (R. 1-17) and are these: The plaintiff in error, a national banking corporation (R. 1), has a capital stock of $100,000.00, divided into 1000 shares of the par value of $100.00 each (R. 2), and in addition on the day next preceding the first Monday in March, 1925, a surplus of $50,000.00 and undivided profits of $2659.13 (R. 2). Its capital stock was owned by some sixteen individuals. (R. 3)

The business of the plaintiff in error is that of a national bank in accordance with the federal statutes. (R. 3)

The Security Trust & Savings Bank, a state banking corporation, transacts a similar business at Billings, Yellowstone County, Montana, in direct and immediate competition with the appellant and in all respects similar thereto except in the issue of notes, payable on demand, intended to circulate as money. (R. 4) Likewise at various points throughout the State of Montana there are some 150 similar state banking corporations, carrying on a banking business in competition with the plaintiff in error in the same manner as the Security Trust & Savings Bank. (R. 4)

On the day next preceding the first Monday in March,

1925, the net moneyed capital of the plaintiff in error employed in its banking business was of the full cash value of $129,463.49, including Liberty Loan bonds of the United States and similar securities of the full cash value of $101,781.25. (R. 4-5) It likewise owned furniture and fixtures of the full cash value of $23,195.64, but no real estate, the foregoing items constituting its total assets. (R. 5)

At the same time the net moneyed capital of the Security Trust & Savings Bank, employed for a purpose identical with the business of the plaintiff in error, was of the full cash value of $51,894.47 without making deduction for Liberty Loan bonds of the United States and similar securities among the assets of this bank of the value of $169,750.00. This bank was moreover also the owner of furniture and fixtures of the full cash value of $12,246.44, and of real estate of the full cash value of $62,375.00. (R. 5)

Of the 150 state banking corporations competing with the plaintiff in error in the State of Montana the net moneyed capital on the same date was approximately $5,500,000.00 including Liberty Loan bonds of the United States and other like securities of the full cash value of about $3,000,000.00. (R. 5-6) These banks were likewise the owners of furniture and fixtures to the extent of more than $2,100,000.00 and of real estate to the value of more than $2,000,000.00. (R. 6)

The moneyed capital of all these state banks was at all times used in direct and immediate competition with the moneyed capital of the appellant and with its shares of stock. (R. 6)

Pursuant to Section 2066, Revised Codes of Montana, 1921 (Appendix D), the plaintiff in error, by its verified statement, disclosed the full cash value of its capital stock to be in the aggregate $152,659.13, and of each share $152.66. (R. 6-7) Pursuant to Section 1999, subdivision 6, Revised

Codes of Montana, 1921 (Appendix C) and to Sections 2963-2067, inclusive, of the same codes (Appendix D), the shares of the capital stock of the plaintiff in error were then assessed by the assessor of Yellowstone County, Montana, at $152,659.13 in the aggregate, or $152.66 each, without deduction for its Liberty Loan bonds. (R. 7-8) To the contrary, in fixing this value for taxation purposes these securities to the extent of $101,781.25 were expressly included among the assets of the plaintiff in error. (R. 8) The deduction or exclusion of this item would have reduced the aggregate value of the capital stock of the plaintiff in error to $50,877.88, that is, a value for each share of $50.88. (R. 8)

For the year 1925 the shares of the capital stock of banking corporations, organized under the laws of the State of Montana including the Security Trust & Savings Bank, were not taxed at all. (R. 8-9) In lieu thereof a tax was levied directly upon the real estate, the furniture and fixtures and the moneyed capital of these corporations, which were valued at approximately $2,000,000.00 for real estate, $2,100,000.00 for furniture and fixtures, and $2,500,000.00 for moneyed capital. (R. 9)

In the case of the Security Trust & Savings Bank real estate for purposes of taxation was assessed at $62,375.00, and furniture and fixtures at $12,246.44, totalling $74,621.44. No part of its moneyed capital was assessed or taxed in any fashion. (R. 9)

The value of the moneyed capital of these state banks, and particularly the Security Trust & Savings Bank, was computed for taxation purposes in 1925 by deducting from their moneys and credits the amount of their deposits and of any indebtedness representing money borrowed for use in their business, and, in addition thereto, the full cash value of

all Liberty Loan bonds and other securities of the United States. (R. 10) In other words, from the sum of $5,500,000.00, the full cash value of the net moneyed capital of the State banks, there was deducted the further sum of approximately $3,000,000.00 represnting these bonds and securities appearing among the moneys and assets of these banks. The resultant figure of $2,500,000.00 was thereupon fixed as the value of the moneyed capital of the state banks for the year 1925 and used as the basis for taxation. (R. 10)

Specifically in the case of the Security Trust & Savings Banks this method of assessment resulted in the exclusion from its moneys and credits of the sum of $169,750.00, the value of its Liberty bonds, and the consequent reduction of its moneyed capital for taxation purposes to nothing. (R. 10-11)

At the same time the shares of the capital stock of the Security Trust & Savings Bank which were not taxed directly in any fashion were in the aggregate of the full cash value of $126,515.91, or each of the value of $126.52; but by assessing and taxing the real estate, furniture and fixtures, and moneyed capital of the bank in the foregoing manner, the value thus fixed at $74,621.44 was the equivalent for taxation purposes of a direct assessment of the shares of stock at the value of $74,621.44, or $51,894.47 less than the true value of these shares (R. 11), and was the equivalent further of an assessment of these shares directly to the shareholders at an aggregate value of $12,246.44 and of the real estate directly to the bank at $62,375.00. (R. 11)

As applied to the other state banks whose capital stock was of the approximate true value of $9,600,000.00, this method of assessment for the year 1925 resulted in fixing the value of their real estate, furniture and fixtures and moneyed capital at the sum of $6,600,000.00 in round numbers, the equivalent of an assessment of their shares of stock at a like figure, that

is, approximately $3,000,000.00 less than the true cash value of these shares, and the equivalent of an assessment of these shares directly to the shareholders at $4,600,000.00 with real estate assessed to the banks at the figure of $2,000,000.00 (R. 11-12)

To carry this comparison a step further if the capital stock of the Security Trust & Savings Bank had been assessed at its full cash value, less only the value of all real estate of the corporation, that is, if its capital stock had been assessed by the method employed in ascertaining the value of the shares of the plaintiff in error, the capital stock of this state bank would have been valued in the aggregate at $64,140.91, that is, each share at $64.14, exclusive of real estate. (R. 12) To apply the same rule to all the state banks in Montana for 1925 would have resulted in the fixing of the aggregate cash value of their shares of stock for assessment purposes at approximately $7,600,000.00 with real estate otherwise assessed to the banks directly. (R. 12-13)

By reason of the difference between the method employed in fixing the value of the shares of the plaintiff in error for taxation purposes and the method followed in taxing state banks there was imposed pursuant to such assessment a tax upon the capital stock of the plaintiff in error for the year 1925 which was at a greater rate than was assessed upon the shares in state banks directly or indirectly, notwithstanding that these banks were direct competitors of the plaintiff in error. (R. 13)

Because of this discrimination it was and is the contention of the plaintiff in error that Section 1999, subdivision 6, Revised Codes of Montana, 1921 (Appendix C), and Chapter 162 of Part III of the Political Code, Revised Codes of Montana, 1921, Sections 2063 to 2067, inclusive (Appendix D), and the tax imposed upon its shares of stock pursuant thereto for the year 1925, are illegal and void for the reasons,

among others, that these statutes and this tax conflict with Section 5219, United States Revised Statutes, as amended by the Act of Congress of March 4, 1923, Chap. 267, 42 Stat. at L. 1499. (R. 13-14) Nevertheless a tax amounting to $3897.84 for the year 1925 was levied upon the shares of the plaintiff in error against its stockholders pursuant to the statutes mentioned and to the assessment made in conformity therewith; and thereafter the defendant Henry S. Nutt, as the treasurer of the defendant Yellowstone County, Montana, demanded of the plaintiff in error the payment of fifty per centum of this tax on or before November 30th, 1925. (R. 15-16) Accordingly the plaintiff in error paid under protest the portion of the taxes demanded and thereafter prosecuted its action for the recovery of this tax upon the grounds stated.

II.

DISCUSSION OF FACTS AND AUTHORITIES

The several assignments of error present the same general question, viz: whether the tax exacted by the State of Montana from the shareholders of the plaintiff in error on account of its shares of stock is at a greater rate than the tax exacted for the same year by the state from the shareholders in state banking corporation on account of their shares in these state banks. For convenience we shall consider these different assignments together.

This Court has already considered and invalidated the scheme of taxation under the law of Montana as applied to shares in national bank in three recent cases:

Commercial National Bank of Miles City, Montana, et al. v.

Custer County, et al., decided December 5th, 1927, not yet officially reported.

W. M. Turner, Receiver, etc., et al. v. Custer Copunty, et al., decided December 5th, 1927, not yet officially reported.

Miles City National Bank v. Custer County, et al. decided December 5th, 1927, not yet officially reported.

The case disclosed by this record presents a different angle of the same question. Whereas in the cases cited it was decided that the classification of moneyed capital for the purposes of taxation in class 5 of Section 1999, Revised Codes of Montana, 1921, taxed at seven per cent of its full and true value under Section 2000, Revised Codes of Montana, 1921, (Appendix C) discriminated against shares in national banks which were classified under Class 6, Section 1999, supra, and taxed at forty per cent of their full and true value under Section 2000, supra, we are in the case now at bar concerned with a tax imposed upon the shares in national banks which are valued for assessment purposes at a figure equivalent to the value of the entire corporate assets, including Liberty Loan bonds and similar securities, themselves exempt from direct taxation, while shares in state banks, not assessed directly in any manner, are indirectly taxed upon a basis representing the value of the corporate property less such exempt bonds and assets. As demonstrated by the facts alleged in the complaint and conceded by the demurrer the discrimination effected by these methods of valuation is substantial with the result that shares in national banks bear a much greater burden of taxation than is indirectly imposed upon shares in state banks.

The fact that such a discrimination existed in fact in the imposition of the tax complained of here is conceded by the opinion rendered below in the Supreme Court of the State of Montana wherein (R. 30-31) these words are found:

> "The shares of the Security Bank & Trust Company were not taxed for the year 1925, but was the failure to

tax because of an unfriendly discrimination by act of the Legislative department or through a misconception of the law on the part of the officers of the state and county who are charged with the execution of the laws?"

This discrimination, however, is by the court ascribed not to a defect in the law of the state but to a misconception of such law on the part of the taxing officers (R. 32-33) where this language is used:

> "It follows that it was not by authority of law that the taxing officers omitted the taxation of the shares of the Security bank. The law did not authorize the omission of these shares from taxation and their taxability in the instant case must be admitted."

Again:

> "But a tax law cannot be held invalid for want of equality and uniformity because inequality or lack of uniformity results from the error or misconduct of the officers charged with the imposition or collection of the tax."

When the tax complained of here, however, was imposed, the law of Montana as found in the statutes cited and the opinions of its Supreme Court was as stated in *East Helena State Bank v. Rogers, 73 Mont. 210, 217*, where we read:

> "This state had the option to tax the shares of stock in state banks to the individual shareholders, or to tax the property of such banks to the banks themselves. It could not tax both at the same time. (Sec. 17, Art. XII, Constitution of Montana) It it had chosen the first alternative, it might then have assessed the shares at their full cash value without reference to the character of the securities in which the bank's funds were invested (Van Allen v. Assessors, 3 Wall. 573, 18 L. Ed. 229 [see, also, Rose's U. S. Notes]); but it chose to tax the property of the banks, and must abide the consequences."

When taxes for the year 1925 were laid upon the shares of the plaintiff in error the pronouncement of the Supreme Court of the state to the foregoing effect was the law of Montana and pursuant to that law as announced in this case both shares in national banks and the property of state banks was taxed. Moreover pursuant to this interpretation of the state law, and in exact accordance with its language, no tax was laid upon shares in state banks in any particular, and of course United States bonds among the assets of state banks were not taxed. Not until the opinion in the case now at bar in this court was rendered in the Supreme Court of Montana on December 30th, 1926, was the rule of *East Helena State Bank v. Rogers, supra,* modified, disapproved or changed. The Supreme Court of the State of Montana recognizes as much in the course of its opinion. (R. 30) Until the rule of *East Helena State Bank v. Rogers, supra,* was overruled by the court in its opinion in this case the law of Montana announced in the earlier case was as quoted above. In accordance with that law the assessor and other taxing officers of the counties and of the State of Montana were forbidden to tax the shares in state banks at all or any part of their full cash value. When the shares of the plaintiff in error were taxed for the year 1925 it was the law of the State of Montana that since the state had chosen to tax the property of the state banks directly it could not also tax the shares of stock in these same banks to the individual stockholders. We therefore respectfully submit that the conceded discrimination in favor of the state banks and against shares of stock in national banking associations resulted from the inequality of the law as announced by the highest court of the state and as obeyed by the taxing authorities, and did not flow from any misconception or misapplication either of the statutes of the State of Montana or of the opinions of its Supreme Court.

Predicating our contention then upon the proposition that the discrimination against shareholders in national banks, disclosed by the admitted facts of the complaint and conceded by the Supreme Court of Montana in its opinion below was in this case a discrimination in law and not in fact resulting from the administration of the law by the taxing authorities, we urge that this Court has again and again invalidated similar statutes because of their conflict with the plain provisions of Section 5219, United States Revised Statutes. (Appendix A)

In *Van Allen v. Assessors, 3 Wall. 573*, the question was first presented under an earlier statute, the limitation of which was:

> "That the tax so imposed under the laws of any state upon the shares of the associations authorized by this Act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located."

This limitation is however, we submit, included within the prohibition as well of Section 5219, supra, as amended by the Act of Congress of March 4th, 1923 (Appendix A), with which the tax in question here must conform to be valid and in subdivision 1, paragraph (b), of which it is provided that in the "case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals citizens of such State coming into competition with the business of national banks" etc. In the course of its opinion in *Van Allen v. Assessors, supra*, this Court uses this language:

> "The decree of the Court of Appeals must be reversed on the grounds that the Enabling Act of the State, passed March 9th, 1865 (sess. 1, ch. 97) does not conform to the limitations by the Act of Congress, passed June 3, 1864, ch. 106 (13 Stat., 99), organizing the national

banks, and providing for their taxation (sess. 41). The defect is this: one of the limitations in the Act of Congress is, 'That the tax so imposed under the laws of any State upon the shares of the associations authorized by this Act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located.' The Enabling Act of the State contains no such limitation. The banks of the state are taxed upon their capital; and although the act provides that the tax on the shares of the national banks shall not exceed the par value, yet, inasmuch as the capital of the state banks may consist of the bonds of the United States, which are exempt from state taxation, it is easy to see that this tax on the capital is not an equivalent for a tax on the shares of the stockholders * * * *

"Upon the whole, after the maturest consideration we have been able to give to this case, we are satisfied that the States possess the power to tax the whole of the interest of the shareholder in the shares held by him in these associations, within the limit prescribed by the Act authorizing their organization. But, for the reasons stated in the forepart of the opinion, the judgment must be reversed and the case remitted to the Court of Appeals of the State of New York, with directions to enter judgment for the plaintiffs in error, with costs."

In *Mercantile National Bank v. Mayor etc. of the City of New York, et al., 121 U. S. 138*, the authority of *Van Allen v. Assessors, supra*, on this point is affirmed at page 152:

"The rule of decision in Van Allen v. Assessors, supra, is not inconsistent with that followed in People v. Commissioners, supra. In the former of these cases the comparison was between taxes levied upon the shares of national banks and taxes levied upon the capital

of state banks. In the valuation of the capital of state banks for this taxation, non-taxable securities of the United States were necessarily excluded, while in the valuation of shares of national banks no deduction was permitted on account of the fact that the capital of the national banks was invested in whole or in part in government bonds. The effect of this was, of course, to discriminate to a very important extent in favor of investments in state banks, the shares in which eo nomine were not taxed at all, while their taxable capital was diminished by the subtraction of the government securities in which it was invested, and against national bank shares taxed without such deduction at a value necessarily and largely based on the value of the government securities in which by law a large part of the capital of the bank was required to be invested."

In *Marion National Bank of Lebanon v. Burton*, and *Citizens' National Bank of Lebanon v. Same*, *121 Ky. 876*, the same question was presented to the Court of Appeals of the State of Kentucky. The facts of these cases are thus stated by the court:

"These two cases present a common question, and were heard together. Each of appellants is a national bank, located at Lebanon, Marion County, this state. Their shares were assessed for taxation by the assessor of Marion County. The valuation of each share for assessment was arrived at by ascertaining the market or actual value of the shares, deducting from that sum the value of the real estate owned by the banks, and dividing the remainder by the total number of shares. No deduction was made on account of United States bonds owned by the banks in which their capital had been invested. The whole of this tax, however, was collectible by the terms of the statute from the bank on account

of its stockholders. While the tax was levied upon the shares of the capital stock, the bank was required to pay the tax on the behalf of its stockholders, charging same to each shareholder's stock account."

In the opinion the question between the parties is framed in these words:

"The stockholders' interest in both state and national banks is made liable to taxation, directly or indirectly by the sections named. Is there a discrimination made in favor of shareholders of state banks over those of national bank stock? Appellants claim there is, in this: They assert that state banks are assessed upon their capital; that, being so assessed, so much of their capital as may be invested in the bonds of the United States is not subject to taxation, while where the assessment is made upon the shares of the capital stock, as is the case with national banks, the bonds of the United States in which the capital of such national banks may be invested are not deducted."

In its opinion the Court of Appeals of Kentucky first holds that the tax levied by the state laws upon state banks is a tax upon the property of such state banks as distinguished from a franchise tax, exactly as the law of Montana was declared by the supreme court of that state in *East Helena State Bank vs. Rogers, supra,* (See. 73 Montana 212), and then announces the invalidity of the tax in question there in this paragraph:

"Therefore, under the decisions of the Supreme Court of the United States, cited and quoted above, the state banks are entitled to have deducted from such assessment so much of their capital as is invested in the nontaxable securities of the United States. It follows that shares in national banks must be treated, as to their taxation, in the same way, or at least so that they will not be discriminated against. In a sense, and indirectly, a tax

paid upon the capital of a bank is at last paid by its shareholders out of that which would otherwise come to them. So that a tax against a state bank, which is entitled to have deducted from the assessment of its capital so much of its capital as was invested in the bonds of the United States, discriminates in law against a national bank shareholder, who is assessed upon the value of his share in the national bank's capital, from which no such deduction is allowed."

In *McHenry vs. Downer, 116 Cal. 20,* the Supreme Court of the State of California disposed of a similar question in this language:

"Assuming then, as we must, that Section 3608 of the Political Code is constitutional, this difference is presented in the method of valuation for the purposes of taxation between state banks and the shareholders of national banks: The shares of stock in the former are not assessed. In lieu thereof, all the property of the corporation is assessed. But this does not include government bonds or other nonassessable property, and all solvent creditors unsecured by deed of trust, mortgage or other lien on real or personal property due or owing are to be assessed subject to a deduction for all debts, (not secured as above) due and owing by the corporation to bona fide residents of the state. * * * The disparity in the mode of valuation becomes more apparent when we consider that one-third of the paid-up capital stock of every national bank must be invested in nonassessable property, viz. in the registered bonds of the government of the United States, which are required to be deposited with the treasurer of the United States as security for its notes, before it can be authorized to do business. No method is provided in our statute for deducting from the value of the shares anything on this account, and in the

case at bar it was not done.

"Waiving then, the fact that shares in state banks are not assessed at all, and assuming that the assessment of all the property of a state bank may be the equivalent of the assessment of the shares of stock in a national bank, and the stubborn fact still remains that under our law it is not such equivalent, but militates most grievously against the owners of stock in national banks. Exact equality, from a mathematical standpoint, may not be attainable in the matter of taxation; but a system which of necessity, and not from accident or error of judgment, discriminates against the owners in national banks to a large extent, is in violation of the restriction imposed by congress upon the privilege granted to the states to tax shares in national banks."

In *San Francisco National Bank vs. Dodge, 197 U. S. 70,* this Court by its opinion invalidated a statute levying a tax upon shares of stock in national banks, where a property tax was levied directly upon the assets of state banking corporations, upon the ground that the tax so imposed was not the equivalent of the burden imposed upon the owners of shares in national banks. While the facts appearing from this opinion are not the facts of the case at bar in that the discrepancy in values for purposes of taxation did not result from the exclusion of Liberty Loan bonds, etc., in the case of state banks, the reasoning and the law announced by this Court there is nevertheless applicable to the discrimination disclosed by the record here. We are interested in this case with a discrimination between state and national bank shareholders substantially the same in all respects as that condemned by the opinion of this Court in *San Francisco National Bank vs. Dodge, supra,* and which plainly violates the letter and the spirit of section 5219, United States Revised Statutes, supra.

To state this discrimination in other words, the total tax paid in 1925 by the Security Trust & Savings Bank, a state banking corporation, and indirectly borne by its shareholders, is the equivalent of a tax levied upon its shares of capital stock against the several shareholders at an assessed value of $12,246.44, and upon real estate of the corporation at an assessed value of $62,375.00. (R. 11) Had the shares of this state bank borne a burden equal to that imposed upon the shareholders of the appellant for this same year its shares of capital stock would have been assessed to its shareholders at the sum of $64,140.91 (R. 12), with real estate to the corporation at $62,375.00. (R. 11). Had the other state banking corporations been taxed in a manner similar to that employed in the case of the appellant their shareholders would have paid taxes upon an aggregate assessed value for such shares of $7,600,000.00 (R. 13), and the banks themselves would have been taxed upon real estate to the amount of $2,000,000.00 (R. 12). The shareholders of the Security Trust & Savings Bank would have paid taxes, directly and indirectly, upon a grand total for all taxable property of $126,515.91. This sum would then have been the equivalent of the full cash value of the shares of the capital stock of this bank (R. 11); and a tax imposed pursuant thereto would then be the equivalent of the assessment and tax imposed upon the shares of the plaintiff in error (R. 6-7). So too, the tax imposed upon the other state banking corporations, based upon an assessment of all taxable property, amounting to $9,600,000.00 would then have been the equivalent of a tax upon the full cash value of the shares of the capital stock of these corporations (R. 11-12); and the discrimination complained of by the plaintiff in error would not have existed.

The method of taxation applied to national banks in the State of Montana by means of which taxes were imposed

upon the shares of the plaintiff in error during 1925 reached every element of value reflected in their shares of stock by first taxing real estate to the corporation itself and the balance of the full cash value of the shares, including the value of government securities owned by the corporation, to the shareholders themselves. The method of taxation applied to state banks on the other hand permitted the value of their shares, so far as this value represented government obligations owned by the corporations, to escape any taxation whatsoever. The discrimination against national banks and against the shareholders in these institutions is apparent.

The conclusion therefore which must be drawn from the authorities cited as applied to these facts is that although a state need not tax its own banks, or their shares of stock, by the same means as that employed in the case of national banks nevertheless some tax must be imposed upon the moneyed capital of its own corporations, including their shares of stock, which at least is the equivalent of the tax laid upon shareholders in national banks, if the discrimination prohibited by section 5219, United States Revised Statutes, supra, is to be avoided. Any substantial variation from this standard, affecting the state at large, or any considerable quantity of moneyed capital invested in competition with the business of national banks, will render the tax levied by state authorities upon national bank shareholders illegal and void. Such a variation resulting in a most grievous discrimination against the owners of stock in the plaintiff in error appears from this record. We earnestly contend that by reason of this discrimination the taxes demanded in this case are illegal and void.

We respectfully submit that upon the authorities cited above and for the manifest errors appearing in the record the

judgment of the Supreme Court of the State of Montana in this case should be reversed.

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APPENDIX A

Act of March 4th, 1923, Chap. 267, 42 Stat. at L. 1499.

That section 5219 of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"Sec. 5219. The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations, located within its limits. The several States may tax said shares, or include dividends derived therefrom in the taxable income of an owner or holder thereof, or tax the income of such associations, provided the following conditions are complied with:

"1. (a) The imposition by said State of any one of the above three forms of taxation shall be in lieu of the others.

"(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks; *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

"(c) In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations doing business within its limits.

"(d) In case the dividends derived from the said

shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

"2. The shares or the net income as above provided of any national banking association owned by non-residents of any State, or the dividends on such shares owned by such nonresidents, shall be taxed in the taxing district where the association is located and not elsewhere; and such associations shall make return of such income and pay the tax thereon as agent of such nonresident shareholders.

"3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

"4. The provisions of section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section."

APPENDIX B

Constitution of the State of Montana.

Article XII, Section 7: "The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on real and personal property owned or used by them and not by

this constitution exempted from taxation."

Article XII, Section 17: "The word property as used in this article is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the state and has been taxed."

APPENDIX C

Statutory Provision for Taxation in General

Section 1997, Revised Codes of Montana, 1921:

"All property in this state is subject to taxation, except as provided in the next section.

Section 1998, Revised Codes of Montana, 1921:

"The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, public libraries, such other property as is used exclusively for agricultural and horticultural societies, for educational purposes, places of actual religious worship, hospitals, and places of burial not used or held for private or corporate profit, and institutions of purely public charity, evidences of debt secured by mortgages of record upon real or personal property in the State of Montana, and public art galleries and public observatories not used or held for private or corporate profit, are exempt from taxation, but no more land than is necessary for such purposes is exempt; provided, that the terms public art galleries and public observatories used in this act shall mean only

such art galleries and observatories whether of public or private ownership, as are open to the public, without charge or fee at all reasonable hours, and are used for the purpose of education only."

Section 1999, Revised Codes of Montana, 1921:

"For the purpose of taxation the taxable property in this state shall be classified as follows:

"Class One. The annual net proceeds of all mines and mining claims, after deducting only the expenses specified and allowed by section 2565 of the Revised Codes of Montana (2090); also where the right to enter upon land to explore or prospect or dig for oil, gas, coal, or mineral is reserved in land by any person or corporation, the surface title to which has passed to another, the assessor and the state and county boards of equalization shall determine the value of the right to enter upon said tract of land for the purpose of digging, exploring, or prospecting for gas, coal, oil, or minerals, and the same shall be placed in this classification for the purpose of taxation.

"Class Two. All household goods and furniture, including clocks, musical instruments, sewing machines, wearing apparel of members of the family, and all personal property actually used by the owner for personal and domestic purposes, or for the furnishing or equipment of the family residence; all agricultural and other tools, implements and machinery, gas and other engines and boilers, threshing machines and outfits used therewith, automobiles, motor trucks and other power driven cars, vehicles of all kinds, boats and all water craft, harness, saddlery and robes.

"Class Three. Livestock, poultry and all agricultural products; stocks of merchandise of all sorts; together

with furniture and fixtures used therewith.

"Class Four. All land, town and city lots, with improvements, manufacturing and mining machinery, fixtures and supplies, except as otherwise provided by the Constitution of Montana.

"Class Five. All moneys and credits, secured or unsecured, including all state, county, school district and other municipal bonds, warrants and securities without any deduction or offset; provided, however, that the terms, moneys, and credits as herein used shall not embrace the moneyed capital employed in the banking business by any banking corporation or individual in this state.

"Class Six. The shares of stock of national banking associations and the moneyed capital employed in conducting a banking business by any other banking corporation, association or individual in this state. Such money capital to be ascertained by deducting from the moneys and credits of such banking corporation, association, or individual, the amount of the deposits and any indebtedness representing money borrowed for use in said business, and the value of the shares of any national banking association, to be ascertained by deducting the value of all real estate of such association.

"Class Seven. All property not included in the six preceding classes."

Section 2000, Revised Codes of Montana, 1921:

"As a basis for the imposition of taxes upon the different classes of property specified in the preceding section, a percentage of the true and full value of the property of each class shall be taken as follows:

"Class 1. One hundred per cent. of its true and full value.

"Class 2. Twenty per cent. of its true and full value.

"Class 3. Thirty-three and one-third per cent. of its true and full value.

"Class 4. Thirty per cent. of its true and full value.

"Class 5. Seven per cent. of its true and full value.

"Class 6. Forty per cent. of its true and full value.

"Class 7. Forty per cent. of its true and full value."

APPENDIX D

Statutory Provision for Taxation of National Banks.

Section 2063, Revised Codes of Montana, 1921:

"The shares of the capital stock of banks organized under the laws of the United States, not located in this state, owned by residents of this state, are not subject to taxation."

Section 2064, Revised Codes of Montana, 1921:

"All shares of stock in national banks existing by authority of the United States and located and doing business within this state, shall be assessed to the owners thereof in the cities, towns, or places where such banks are located, and not elsewhere, in the assessment of all state, county, school district, and municipal taxes, imposed and levied in such place whether or not the owner of such stock is a resident of such city, town or place."

Section 2065, Revised Codes of Montana, 1921:

"Every national bank shall pay to the person authorized to collect taxes in the state, county, city, town, or place in which such bank is located, at the time of each year when other taxes become due, the amount of the tax upon the shares in such bank. Said banks shall be liable for the payment of the said tax, and if the same is not paid on or before the thirtieth day of November of each

year at six o'clock p. m. the said tax shall become delinquent, and shall be collected in the same manner and be subject to the same laws as all other delinquent taxes.

"For convenience, the assessment of shares of stock in national banks, and herein referred to, shall be entered on the personal property assessment list under the name of the bank, and in such statement the names of the holders of bank stock shall be set forth, and the shares owned by each, and such assessment, when so entered, shall have all the force and effect as if made in the name and against the holder of bank stock individually."

Section 2066, Revised Codes of Montana, 1921:

"The cashier of every national bank shall make and deliver to the assessor of the county in which said bank is located, within five days after demand therefor, a statement, verified by his oath, showing the name of each shareholder, with his residence and the number of shares belonging to him at the close of business the day next preceding the first Monday in March, in each year, as the same then appeared on the books of said bank, and showing the face value of the capital stock, and the amount of surplus and undivided profits of said bank, and an estimate of the value for which such stock shall be assessed. If said cashier fails to make such statement as required, the assessor shall forthwith obtain said information from the officers of the bank, and for this purpose he shall have access to the books of the bank, and the assessor shall therefor make an assessment of such stock, which shall be as fair and equitable as he may be able to make from the best information available, or he may adopt the figures disclosed by any prior report of the officers or directors of the bank, made to any state or federal officer to whom such bank is by law

required to make reports."

Section 2067, Revised Codes of Montana, 1921:

"The cashier or secretary of every state bank or banking corporation, and every private banker shall make and deliver to the assessor of the county in which said bank is located, within five days after demand therefor, a statement, verified by his oath, showing the total moneys and credits of such bank, the amount of its deposits and any indebtedness representing money borrowed by said bank for use in its banking business, as disclosed by the books of said bank at twelve o'clock noon on the first Monday in March of each year. If said cashier shall fail to make the report hereby required the assessor shall forthwith obtain such information from the officers of said bank, and for this purpose he shall have access to the books of said bank, and the assessor shall thereupon make an assessment of the moneyed capital employed in conducting the business of said bank, which assessment shall be as fair and equitable as he may be able to make from the best information available, or said assessor may, for the purpose of said assessment, adopt the figures disclosed by any prior report of the officers or directors of such bank, made to any state or federal officer to whom such bank is by law required to make reports. Any cashier or other person failing to make the statements hereby required shall be guilty of a misdemeanor, and shall be punishable accordingly."

JAN 17 1928
CHARLES ELMORE CROPL
CLERK

Supreme Court of the United States

OCTOBER TERM, 1927

No. 207

THE MONTANA NATIONAL BANK OF BILLINGS, a national banking corporation,

Plaintiff in Error.

vs.

YELLOWSTONE COUNTY OF THE STATE OF MONTANA, a municipal corporation, and HENRY S. NUTT, as County Treasurer of Yellowstone County, State of Montana,

Defendants in Error.

BRIEF IN REPLY OF PLAINTIFF IN ERROR

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Defendants in Error.

BRIEF IN REPLY OF PLAINTIFF IN ERROR

This brief in reply is filed by the plaintiff in error in answer to the points made by the defendants in error in their brief. These points will be briefly discussed in the order in which they are presented by the Attorney General of the State of Montana.

I.

THE DEFENDANTS IN ERROR CONTEND THAT THE TAX IN QUESTION IS NOT DISCRIMINATORY.

The plaintiff in error contends in its brief in chief (pp. 14-16) that the law of the state of Montana as announced by the Supreme Court of that state in *East Helena State Bank vs. Rogers, 73 Mont. 210,* and in force at the time of the levy of the tax in question here, exempted the shares in state banking corporations from any tax at all, and that pursuant to this interpretation of the law no tax was levied or assessed upon the shares in state banks during the year 1925, or upon their value in whole or in part. From these facts the plaintiff in error urges that the discrimination disclosed in its amended complaint arose. This contention is answered by the Attorney General by reference to the opinion of the Supreme Court of the state of Montana rendered in *Butte & Superior Mining Co. vs. McIntyre, 71 Mont. 254,* and to the statutes of the state of Montana authorizing the subsequent taxation of property which in previous years may have escaped assessment. *Brief of Defendants in Error, p. 4* Reference is here made also to *Chapter 64, Session Laws of Montana of 1927,* (Appendix Z) which became effective from and after March 1st, 1927. As we understand the argument of the Attorney General upon this authority and these statutes it is that although the shares in state banks were in fact not taxed in 1925 to the extent of their value over and beyond the taxable property of the corporations themselves nevertheless it is now possible under the statutes of the state as construed by its Supreme Court to exact such a tax from these shares for the year 1925. To our minds this argument overlooks the effect of the decision of the Supreme Court in *East Helena State Bank vs. Rogers, 73 Mont. 210, 217,* quoted at page 14 of the brief in chief filed by the plaintiff in error. At the

time the tax complained of in this cause was assessed and demanded the law of Montana was as stated in that opinion that under the Constitution of the State the property and the shares of state banks were not taxable at the same time, that the State having chosen to tax the property of such banks was forbidden to tax their shares of stock. The opinion in the cause at bar rendered by the Supreme Court of the state of Montana on December 30, 1926, (*Montana National Bank of Billings vs. Yellowstone County, et al., 78 Mont. 62, 83*) first modified the rule of *East Helena State Bank vs. Rogers, supra*, more than one year after the taxes in question here were demanded and paid under protest on November 30th, 1925. (R. 15-16) We may concede that the law of Montana both by statutory enactment and the decision of its Supreme Court now authorizes and exacts a tax from the shareholders in state banks to the extent that such shares are not represented by property of the corporation or otherwise taxed directly to it. But we do not concede and we have been unable to find any authority holding that such a subsequent modification of the law will render valid and legal a tax which under the law as it stood at the date of the institution of this action was discriminatory and illegal. We urge that if the tax drawn in question here may thus be validated then any discriminatory tax when questioned may be justified by an appropriate decision of the Supreme Court or by subsequent legislation. To illustrate: This Court has already invalidated the tax imposed under the law of Montana in the cases of *Commercial National Bank of Miles City, Montana, vs. Custer County; Turner, as Receiver, etc. vs. Custer County; and Miles City National Bank vs. Custer County*, decided December 5th, 1927, not yet officially reported, upon the ground that certain moneyed capital in the hands of individual citizens of the state was taxed at seven per cent. of its true value while shares of stock in national

banks were taxed at forty per cent. of their true value. To carry the argument of the Attorney General in the cause at bar to its logical conclusion, if it be sound, would mean that the tax, invalidated in these cases by this Court under the law of Montana as it stood at the time the tax was levied, demanded and paid under protest, can now be validated and rendered legal by the simple expedient of a legislative enactment or decision of the Supreme Court classifying the moneyed capital heretofore taxed at seven per cent. of its true value as property which is to be assessed for taxation at forty per cent. of such value. Under such a modification of the law the Attorney General would contend that the assessors and taxing officials of the state of Montana should re-assess the moneyed capital in the hands of the individual citizens of the State upon the same basis as the shares of stock in the Commercial National Bank of Miles City and the Miles City National Bank were in fact taxed, and by such re-assessment and by the exaction of such additional tax validate a scheme of taxation which was invalid and discriminatory in the years 1922 and 1923, when the tax upon the shares in these banks was imposed. We cannot subscribe to this reasoning, and we have searched the books in vain for authority to sustain this line of argument. We assume that the Attorney General has done likewise with the same result inasmuch as there is no citation in his brief of a case to support his theory here.

True it is, that by the authority of *Butte & Superior Mining Co. vs. McIntyre, 71 Mont. 254,* and *Section 11, Chapter 3, Session Laws of Montana of 1923,* as well as *Section 2034, Revised Codes of Montana, 1921,* property which has escaped taxation during previous years may be subsequently assessed and taxed. But upon the admitted facts of this case no tax had been imposed upon the shares in state banks for the year 1925 at or before the institution of this action, whether pur-

suant to the authority of this decision and these facts, or otherwise, and moreover such tax was in truth not levied because the Supreme Court of the State in *East Helena State Bank vs. Rogers, supra,* had expressly forbidden any such assessment or levy. We agree with the learned Attorney General that the construction put upon the statutes and Constitution of the state of Montana by its Supreme Court is binding in this case upon this Court: for that very reason we urge that the rule of *East Helena State Bank vs. Rogers, supra,* forbidding the taxation of shares in state banking corporations and requiring in lieu thereof the assessment of the property of such corporations and its taxation directly to them, is the law of this case pursuant to which the discrimination against the shares of the plaintiff in error arose. Moreover, we urge that this Court will accept the law of Montana as construed and announced by its highest Court and as that law was when the tax exacted in this case was levied and this suit was commenced. We earnestly press the point that the Supreme Court of Montana was in error in holding that the discrimination arising from the application of the rule of *East Helena State Bank vs. Rogers, supra,* disappeared when that case was overruled and disapproved by its opinion in the cause at bar.

In concluding our argument in answer to the Attorney General under this point we respectfully direct the attention of the Court to the fact that the position of the plaintiff in error here was pressed by the plaintiffs in error in the three earlier cases from Montana, already decided, wherein the validity of the taxation of national bank shares under the state law was involved and this Court invalidated the tax. *See Joint Brief for Plaintiffs in Error, Commercial National Bank of Miles City, et al., vs. Custer County, et al., Cause No. 452; W. M. Turner, Receiver etc. et al. vs. Custer County, et al., Cause No. 453; Miles City National Bank etc. vs.*

Custer County, et al., Cause No. 154, at pages 13-18, inclusive. In other words the position assumed by the plaintiff in error at this time is not new and apparently has been heretofore viewed by this Court with favor. We respectfully submit that the tax in question here is discriminatory and that the point urged by the Attorney General to the contrary is not well taken.

II.

THE DEFENDANTS IN ERROR CONTEND THAT THE DEDUCTION OF TAX EXEMPT SECURITIES FROM THE VALUE OF THE MONEYED CAPITAL OF A STATE BANK AND THE FAILURE TO DO SO IN FIXING THE VALUE OF THE SHARES OF STOCK IN A NATIONAL BANK IS NOT UNLAWFUL DISCRIMINATION AGAINST A NATIONAL BANK.

The gist of this point is stated in the brief of the Attorney General (p. 6) in these words:

> "Hence, in the taxation of state banks the taxing officers deduct, from the moneyed capital, investments in tax exempt securities not because of the state statutes on the subject, but solely because of the Federal Statute."

To sustain this point reliance is had principally upon the opinion of this Court in *Des Moines National Bank vs. Fairweather, 263 U. S. 103*. In support of the argument of the plaintiff in error to the contrary we have already in our brief in chief (pp. 16-21), inclusive, cited the following cases:

Van Allen vs. Assessors, 3 Wall. 573

Mercantile National Bank vs. Mayor, etc. of the City of New York, et al., 121 U. S. 138

Marion National Bank of Lebanon vs. Burton, and Citizen's National Bank of Lebanon vs. same, 121 Ky. 876

McHenry vs. Downer, 116 Cal. 20

San Francisco National Bank vs. Dodge, 197 U. S. 70

To these authorities we add:

Owensboro National Bank vs. City of Owensboro, et al., 173 U. S. 664.

It is therefore of importance to determine whether the opinion in *Des Moines National Bank vs. Fairweather, supra,* is contrary to these decisions. We respectfully submit that it is not, that an examination of the facts of this case discloses a clear distinction between it and the cause at bar as well as the cases cited above.

Des Moines National Bank vs. Fairweather, supra, involved the construction, among other statutes, of Section 1322, Code of Iowa, which so far as material here reads as follows:

> "Sec. 1322. Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located . . . "

To read this statute is to demonstrate that under its provisions shares of stock in national banks were assessed and taxed exactly as were shares of stock in state banking corporations, that is, in either case a tax by this statute is imposed directly upon the shares and against the shareholders. Under this statute no tax at all is levied upon the assets of the corporation, be it national or state, and it is this system of taxation by which state and national banks are treated alike and subjected to exactly the same burden which the Supreme Court of the United States in *Des Moines National Bank vs. Fairweather, supra,* approved.

To the contrary under the law of Montana when the tax

in question in the cause at bar was imposed upon the shares of the plaintiff in error no tax of any kind was laid upon any part of the value of shares in state banking corporations. These latter corporations were taxed directly upon their assets. (*East Helena State Bank vs. Rogers, supra*).

The distinction between the statutes of Iowa under which *Des Moines National Bank vs. Fairweather, supra*, was decided and the law of Montana under which the shares of the plaintiff in error were taxed is emphasized by the history of the Iowa statutes. We ask the indulgence of the Court that we may briefly sketch this history.

Prior to April 6th, 1911, the first two sentences of Section 1322, Code of Iowa, read as follows:

> "Sec. 1322. Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. Shares of stock of state and savings banks and loan and trust companies, shall be assessed to such banks and loan and trust companies, and not to the individual stockholders . . . "

The validity of this statute was called in question in *People's Savings Bank vs. City of Des Moines, et al.*, not officially reported, *101 N. W. 867*, where it was material to determine whether the tax was imposed directly upon the assets and property of the bank, or upon the shares of the stockholders, belonging to them as individuals. Since no deductions were expressly allowed from the values fixed under this statute for taxation purposes, even in the case of non-taxable government bonds, the determination of this question was controlling of the case. If the tax were construed to be upon the property of the banks government bonds, included in the assets, would be exempted from state taxation by operation of the Federal law. *Section 3701, United States Revised Statutes, Section 6815, United States Compiled Statutes* But if the tax were levied upon the shares of stock then government bonds, be-

longing to the bank, were not taxed, and no deductions on this account need be made.

The Supreme Court of Iowa sustained this statute and the tax levied in accordance therewith without excluding exempt securities upon the theory that the assessment was made upon the shares of stock and not upon the property of the bank which the shares represented. On appeal to this Court however, in *People's Savings Bank vs. City of Des Moines, 205 U. S. 503*, the opinion of the Supreme Court of Iowa was reversed, it being expressly held in this Court that under this statute as it then read the tax imposed upon state banks was a tax upon the assets and property of the corporation, and was not a tax upon their shares. The result of this decision was that state banking corporations excluded from their taxable property all bonds and securities of the United States, exactly as now under the authority of *East Helena State Bank vs. Rogers, supra*, such bonds and securities are to be excluded from the taxable assets of state banking corporations in Montana. It follows that the code of taxation in force in Iowa prior to April 6th, 1911, and in the State of Montana when the tax involved in the cause at bar was imposed are identical insofar as their general features and effect may be drawn in question.

Under the Iowa law, however, by this code of taxation no compensating deduction was allowed to the holders of shares in national banks; and consequently later in *First National Bank etc. vs. Estherville, 150 Ia. 95*, the question of a discrimination within the prohibition of *Section 5219, United States Revised Statutes*, was presented to the Supreme Court of Iowa for determination. In other words, the identical case which is now before this Court for decision was there presented to the Supreme Court of Iowa. A discrimination was found to exist; the tax imposed upon the shares in national banks was condemned in the following language:

"We are brought, then, to the question whether a state revenue law which authorizes and requires the taxation of national bank shares as such, but does not provide for or permit the taxation of shares of stock in state banks, is in contravention of section 5219 of the statutes of the United States, and therefore invalid. And to this question we think there can be but one answer. When it must be conceded, as it must be here, under the decision in the Home Savings Bank Case, that shares of stock in state banks are not taxable under our statute, the conclusion is inevitable that the taxation of shares of stock in national banks is a discrimination against such stock, which is prohibited by section 5219. Under said section any discrimination against national bank shares of stock, in the matter of taxation, in favor of other moneyed capital in the hands of individual citizens of the state which comes into competition with the business of national banks, is forbidden. Mercantile Bank of New York, 121 U. S. 152, 7 Sup. Ct. 826, 30 L. Ed. 895; People v. Commissioners, 94 U. S. 418, 24 L. Ed. 164; People v. Weaver, 100 U. S. 539, 25 L. Ed. 705; Bradley v. People, 4 Wall. 462, 18 L. Ed. 433; Van Allen v. Assessor, 3 Wall. 581, 18 L. Ed. 229; Bank of Commerce v. Seattle, 166 U. S. 463, 17 Sup. Ct. 996, 41 L. Ed. 1079; Aberdeen Bank v. Chehalis County, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069; San Francisco Nat. Bank v. Dodge, 197 U. S. 70, 25 Sup. Ct. 384, 49 L. Ed. 669; Citizens' Natl. Bank v. Burton, 121 Ky. 876, 90 S. W. 944, 28 Ky. Law Rep. 864, 10 L. R. A. (N. S.) 947. And see, Hubbard v. Supervisors, 23 Iowa, 130. That the taxation of shares of stock in national banks, when no taxation of shares of stock in state banks is required or permitted, would be such a discrimination as is prohibited by section 5219

is settled beyond controversy."

The decision in *First National Bank vs. Estherville, supra,* was rendered January 19th, 1911. Thereafter on April 6th, 1911, Section 1322, Code of Iowa, was amended by the legislature, and as thus amended was the statute construed and sustained by this Court in *Des Moines National Bank vs. Fairweather, supra.* In other words the Iowa statute involved in this latter case taxed the shares in state and national banks alike to the individual shareholders. It was the contrary of the earlier Iowa statute under which shares of stock in national banks were taxed to the individual shareholders, but the assets of state banking corporations were assessed to the banks themselves. It is likewise at variance with, and to be distinguished from the system of taxation in force in Montana when the tax involved in this cause was imposed under which no levy was made upon shares in state banks, their property being assessed to the corporation with government bonds and securities excluded, while the shares of the stock in the plaintiff in error and other national banks were assessed at their full cash value directly to the individual shareholders. The distinction between the statute considered in *Des Moines National Bank vs. Fairweather, supra,* and the statutes of the state of Montana in question in this cause is apparent, that distinction is emphasized by the history of the Iowa statute thus briefly summarized above.

We respectfully submit that the foregoing analysis demonstrates the futility of urging that this Court has "decided this precise question in the case of *Des Moines National Bank vs. Fairweather,*" etc. The contention made in this Court by the defendants in error, we respectfully submit, was not before this Court in *Des Moines National Bank vs. Fairweather, supra;* and there is no intimation in that decision that the question now presented in the cause at bar was there considered in any fashion. We earnestly urge that the point of the

Attorney General is not well taken to the effect that the deduction of tax exempt securities from the value of the moneyed capital of a state bank in Montana and the failure to make such deduction by authority of law in fixing the value of the shares of stock in a national bank does not result in an unlawful discrimination against the shareholders of the plaintiff in error.

We agree that there "can no longer be any doubt as to the right of a state to tax the interest of a stockholder in a national bank without any deduction for investments of the bank in tax exempt securities." *Brief of Defendants in Error, p. 9* We urge that it is because of this very rule of law that the inequality in the cause at bar results. The law of the state of Montana has not permitted the shareholders of the plaintiff in error to make any such deduction while at the same time by taxing the property of state banking corporations directly to the corporations it has permitted the owners of shares in state banks to escape all taxation for the value of their shares represented by tax exempt securities among the assets of these corporations. Such is the reasoning of the decisions rendered in *Van Allen vs. Assessors, supra*; *Marion National Bank of Lebanon vs. Burton, and Citizens' National Bank of Lebanon vs. Same, supra*; *McHenry vs. Downer, supra;* and *San Francisco Bank vs. Dodge, supra.* We respectfully submit that these cases are sound and controlling here.

III.

THE DEFENDANTS IN ERROR CONTEND THAT IF THE ASSESSMENT IS DISCRIMINATORY THE PLAINTIFF BANK IS NOT ENTITLED TO ALL THE RELIEF DEMANDED.

The shares of the capital stock of the plaintiff in error have been taxed under the law of Montana at their full cash

value(*Section 2001, Revised Codes of Montana, 1921*), less the value of all real estate of the association(*Section 1999, Revised Codes of Montana, 1921*) which in this case is nothing (R. 5). There is in the law of Montana no authority for the taxation of its shares upon any different basis for assessment or with any other deductions. If the state law as it is written discriminates against the shareholders in the plaintiff in error within the meaning of *Section 5219, United States Revised Statutes*, then that law is void and likewise the tax imposed thereunder. There is no other authority for a tax of any kind upon the shares of national banks. Under the state law there is no authority for the computation of any other tax. We respectfluly submit that if the tax in question here is void it must fail *in toto*. It is void if it does not conform to the limitations imposed by Congress. *First National Bank of Gulfport vs. Adams, 258 U. S. 362.*

In support of his contention the learned Attorney General cites the opinion of this court in *Cummings vs. Merchants' National Bank, etc., 101 U. S. 153.* As we read this case it holds merely that where injunctive relief is sought against the collection and enforcement of illegal taxes the complainant should first pay that portion of the tax which is justly demanded and thereafter sue to enjoin the collection of the remainder. We do not conceive that the plaintiff in error has any quarrel with this rule here. In the case at bar the Montana National Bank of Billings has paid under protest and with the permission of the state statutes the whole of the tax demanded of it on behalf of its shareholders (R. 15-16). All of the tax in question was thus paid over on November 30, 1925; plaintiff in error has done more than the rule of *Cummings vs. Merchants' National Bank, etc., supra*, demands. If it be determined that any portion of the payment made is justly due it can be retained by the defendants in error. But if the whole or any part of that payment be illegal we see nothing in the

procedure followed by the plaintiff in error or in the opinion cited by the Attorney General to warrant the denial of relief on the ground. The payment of taxes under protest is authorized by *Section 2269 Revised Codes of Montana, 1921*, as is this action for the recovery thereof. The plaintiff in error has followed the course approved in *First National Bank of Hartford, Wisconsin vs. City of Hartford, 273 U. S. 548.* We respectfully submit upon that authority that the plaintiff in error may recover the whole sum paid, the tax imposed being discriminatory and void in its entirety.

IV

DEFENDANTS IN ERROR CONTEND THAT THE PLAINTIFF IN ERROR SHOULD HAVE SOUGHT RELIEF FROM THE COUNTY AND STATE BOARDS OF EQUALIZATION.

This point was not urged in the argument of this cause below in the Supreme Court of the State of Montana. *See 78 Montana, 62, 69 to 72.* Moreover, in the course of its opinion the Supreme Court of the State of Montana did not consider this point or hold an application to the County and State Boards of Equalization a condition precedent to the right of the plaintiff in error to maintain this action. (R. 20-33). Furthur, we respectfully submit the law of Montana is not in accord with the argument of the learned Attorney General.

It is the contention of the plaintiff in error throughout that the tax drawn in question here is void because of the conflict between the state law and *Section 5219, United States Revised Statutes.* As a condition precedent to the recovery of a tax which is void it is not now, and we earnestly urge never has been the rule in Montana that failure to apply to the state and county boards of equalization is a bar to suit. The rule is

succintly stated by the Supreme Court of the State of Montana in *Thwing vs. Weiser, 65 Mont. 28, 31:*

> "We are not unmindful of the rule announced by this court that it is not necessary, in the case of a tax that is void, to appear before the board of equalization (Barnard Realty Co. v. City of Butte, 50 Mont. 159, 145 Pac. 946) . . . . ."

In *Barnard Realty Co. vs. City of Butte, et al, 50 Mont. 159, 167,* the court states the law thus:

> "Contention is made that this action cannot be maintained, for the reasons that it is not alleged in the complaint nor shown by the evidence that plaintiff appeared before the board of county commissioners while sitting as a board of equalization, and made objection to the assessment, and that the remedy provided by section 2743 of the Revised Codes, as amended by the Act of 1909 (Laws of 1909, c. 135), is exclusive. It is true that the complaint does not allege that the plaintiff appeared before the board and made timely objection to the assessment, nor is it disclosed by the evidence that it did so. It is sufficient to say in this connection, however, that if the taxing authorities undertake to levy a tax not authorized by law, or upon property not subject to be taxed, their action is without jurisdiction and void. (Clark v. Maher, 34 Mont. 391, 87 Pac. 272). It is not necessary to cite authorities to sustain the assertion that the right of the owner to relief by injunction is not in any wise affected by his failure, either upon notice by the assessor (amended section 2743, supra) or by the board itself (Rev. Codes, Sec. 2581), to make timely objection. The assessment being wholly illegal, because without authority, its validity may be questioned by any available method."

In *Northern Pacific Railway Co. vs. County of Musselshell,*

54 Mont. 96, 101, this language is used:

> "The theory upon which the action proceeds is that the tax is wholly illegal, and hence that under the decision in Barnard Realty Co. v. City of Butte, 50 Mont. 159, 145 Pac. 946, the remedy by injunction is available, without allegation and proof of the fact that an unsuccessful application has been made for relief to the board of county commissioners while sitting as a board of equalization."

The sufficiency of the complaint was sustained without further discussion of this point. *See 54 Mont. 96, 109.*

This distinction between a tax which is void and a tax which is irregular merely because of some error on the part of the assessing or taxing authorties is recognized in *First National Bank of Missoula vs. Bailey, 15 Mont. 301*, cited by the Attorney General. (*Brief of Defendants in Error, page 11*). The distinction is thus plainly made in these words (15 Mont. 309):

> "It is conceded by the appellant that its bank stock was subject to taxation, provided it was taxed as the property of the individual shareholders. It is not contended that any unjust discrimination as between this bank stock and other moneyed capital in the state has been made in the taxation thereof. It can only be contended that the assessment was illegal in that the capital stock was assessed to the bank instead of the individual shareholders. To correct this irregularity it was the duty of the plaintiff to apply to the board of equalization."

Moreover the complaints in the cases already decided in this court involving the validity of the taxation of shares in national banks under the law of Montana contain no such allegations. *See Record Commercial National Bank of Miles City, et al., vs. Custer County, et al., Cause No. 452, pages 1-9.*

Belknap Realty Co. vs. Simineo, et al., 67 Mont. 359, is typical of all the cases cited to sustain this point made by the de-

fendants in error. It here appeared that the plaintiff complained of an assessment of real estate, asserting that its true value was $140,000.00 but that the assessor fixed this value at $163,700.00. It was conceded that the real estate in question was taxable to the plaintiff at some valuation. The sole complaint was made of the excessive figure adopted by the assessor. In such a case it was correctly held that relief must first be sought at the hands of the county and state board of equalization. This case, however, and the other authorities as well which are cited by the Attorney General are not in point with the cause at bar for the reasons indicated. Nor has the point here urged by the Attorney General for the first time been sustained in the courts of Montana in any case parallel to that of the plaintiff in error where the assessment and tax is wholly void because of a failure to comply with the limitations prescribed by Congress in *Section 5219, United States Revised Statutes*, or otherwise to acquire jurisdiction. We respectfully submit that we are concerned not with an assessment which is merely irregular, but with a tax which is without authority of law. In the case at bar, there is no error in the assessment so far as the statutes of Montana and the opinion of its Supreme Court are concerned. The assessment and tax laid and demanded are in strict accord with the law of Montana as that law was in 1925. Hence, there is no relief to be had at the hands of the county or state board of equalization, both of which bodies are controlled by the letter of the statute and the opinions of the Supreme Court. Rather in this cause we have a tax assessed and levied exactly in accordance with the law of Montana which is invalid and void because that law conflicts with the statutes of the United States. *First National Bank of Gulfport vs. Adams, 258 U. S. 362.* Under such circumstances we earnestly submit that there is no authority in Montana, or elsewhere, requiring the plaintiff in error as a condition precedent to its right to maintain this action to

seek relief at the hands of the taxing authorities. Immediately upon payment of the tax under protest the plaintiff in error is entitled to maintain this suit in the courts of Montana and therefore before this Court.

For the reasons foregoing we respectfully submit that the contentions of the defendants in error are without merit and that for the manifest error appearing in the record the judgment of the Supreme Court of the State of Montana in this case should be reversed.

Respectfully submitted,

M. S. GUNN,
ROCKWOOD BROWN,
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HORACE S. DAVIS.

Attorneys for Plaintiff in Error

APPENDIX Z

CHAPTER 64

An Act to amend Section 2067 of the Revised Codes of Montana of 1921, Relating to the Assessment and Taxation of State Banks, Banking Corporations and Private Bankers and of Shares of Stock in such State Banks or Banking Corporations and Providing for the Furnishing of Certain Information to County Officials by Bank Officials.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA:

Section 1. That Section 2067 of the Revised Codes of Montana of 1921, be, and the same is hereby amended so as to read as follows:

SECTION 2067. Every State bank or banking corporation located and doing business in this State, and every private banker, doing business in this State, shall be taxable upon the value of all real estate and personal property owned by such bank, banking corporation or private banker, and also upon the moneyed capital employed in such business, such moneyed capital to be acertained as provided by Section 1999 of the Revised Codes of Montana, 1921; and the cashier and secretary of every such bank or banking corporation, and every such banker, shall furnish within five days after the demand therefor, a statement verified by his oath, showing all the resources and liabilities of such bank to the assessor of the county in which its or his bank is located, as disclosed by its books, at twelve o'clock noon on the first Monday of March in each year; if such cashier, secretary or private banker shall fail to make the statement hereby required, the assessor shall forthwith obtain such information from any other available source, and for this purpose he shall have access to the books of such bank, banking corporation or private banker. The assessor shall thereupon make an assessment of the

real estate and personal property owned by such bank, banking corporation or private banker, and of the moneyed capital employed in the business of such bank, banking corporation or private banker, which assessment shall be as fair and equitable as he may be able to make from the best information available, or said assessor may, for the purpose of said assessment, adopt the figures disclosed by any prior report made by such bank, banking corporation or private banker to any State or Federal officer pursuant to any State or Federal law. Any person required by this section to make the statement hereinabove provided, who shall fail to furnish the same, shall be guilty of a misdemeanor and shall be punished accordingly.

All shares of stock in any such bank or banking corporation shall be assessed at their full cash value, except to the extent that that value is represented in property which is assessable and taxable to such bank or banking corporation in this State, and shall be taxable to the owners of such shares in the county, school district, city, town or place where such bank or banking corporation is located and not elsewhere, whether or not the owners of such shares are residents of such county, school district, city, town or place. The cashier or secretary of any such bank or banking corporation shall furnish to the assessor, upon his demand therefor, the name of each stockholder with his residence and the number of shares belonging to him at twelve o'clock noon of the first Monday in March of each year; and if such cashier or secretary, for more than five days after such demand, shall fail to furnish such information, he shall be guilty of a misdemeanor and the assessor may obtain such information from any other available source, and for such purpose shall have access to the books of such bank or banking corporation. For convenience the assessment of such shares shall be entered on the personal property assessment list under

the name of the bank or banking corporation concerned, but in the assessment list the names of the owners of such shares shall be set forth and the number of shares owned by each, and such assessment, when so entered, shall have all the force and effect as if made in the names of the owners of such shares individually. The bank or banking corporation in which such shares are owned shall be liable for the payment of taxes assessed against such shares, and such taxes shall be payable by and may be collected from such bank or banking corporation in the same manner and under the same penalties as other taxes; provided that such bank or banking corporation may recover from such owners of shares any taxes so paid on such shares, and shall have a lien therefor upon such shares and upon any dividends accrued or to accrue thereon.

SECTION 2. This act shall be in full force and effect from and after March 1, 1927.

APPROVED March 8, 1927.

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Supreme Court of the United States

OCTOBER TERM, 1927

NO. 207

THE MONTANA NATIONAL BANK OF BILLINGS,
a National Banking Corporation,
Plaintiff in Error,

vs.

YELLOWSTONE COUNTY OF THE STATE OF MONTANA, a Municipal Corporation, and HENRY S. NUTT, as County Treasurer of Yellowstone County, State of Montana,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

STATEMENT OF THE CASE

The statement of the case as made by plaintiff in error is substantially correct.

ARGUMENT

I.

THE TAX IN QUESTION IS NOT DISCRIMINATORY.

It should be noted that the cases of Commercial National Bank of Miles City, Montana vs. Custer County, Turner

vs. Custer County and Miles City National Bank vs. Custer County decided by this court on December 5, 1927, presented an entirely different question than does this case. In those cases the favored moneyed capital complained of was taxed on the basis of 7% of its value, whereas the national bank shares were taxed on 40% of their value. In this case the only capital claimed to be favored in matters of taxation is that invested in shares of stock of state banks. But this is taxed on the basis of 40% of its value the same as national bank shares.

The only contention made is that the tax in question is invalid and discriminatory because in fixing the value of the shares of stock of the plaintiff bank for taxation purposes no deductions are made for investments in tax exempt securities, whereas in fixing the valuation of the moneyed capital of state banks for taxation purposes such deductions are made. Both are placed in the same class under our taxing statutes (Class 6, Section 1999 R. C. M. 1921) and both are taxed upon forty per cent of their value. (Section 2000 R. C. M. 1921). The Supreme Court of Montana held that the tax is not discriminatory and based its conclusion upon the fact that under the constitution and laws of this state the shares of stock in a state bank are taxable in addition to its moneyed capital to the extent that they have a value above and beyond the property of the bank which has been taxed, and hence to the extent that they reflect an interest in tax exempt securities. This conclusion was based upon Section 17, Article XII of our Constitution, which provides:

> "The word property as used in this article is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by

such stocks is within the state and has been taxed."

And Section 16 of the same article which commands that:

> "All property shall be assessed in the manner prescribed by law, except as is otherwise provided in this constitution."

And Section 1997 which provides that "all property in this state is subject to taxation" (with the exception of exempt property not here involved.)

The Supreme Court of Montana after making reference to the foregoing constitutional provisions, said:

> "By the constitution the state is commanded to tax the property of the banks—the corporations—and also the shares if they have a value independent of the taxable property of the bank. It cannot tax the property to the banks and at the same time tax the shares to the extent that the property is taxed, but it can tax the property, and also the shares to the extent that they have a value above and beyond the property of the bank which has been taxed. And it may tax the shares to that extent without reference to the character of the securities which go to make up the value which the shares have over and above the taxable property of the bank. (Van Allen v. Assessors, supra; People v. Commissioners of Taxes, 4 Wall. 244, 18 L. Ed. 344; Home State Bank v. Des Moines, 205 U. S. 503, 51 L. Ed. 901, 27 Sup. Ct. Rep. 571; Cleveland Trust Co. v. Lander, 184 U. S. 114, 46 L. Ed. 458, 22 Sup. Ct. Rep. 395.)" (R. 30).

The Court further said:

> "Sections 1997 and 1998 R. C. 1921, provide that all property in this state is subject to taxation, with certain exemptions, consistently with sections 1 and 2 of Article XII of the Constitution. Subdivision first of section 1996 provides that the term 'property' includes moneys, credits, bonds, stocks, franchises and other matters and things real, personal, and mixed, capable of private ownership."

But the plaintiff in error contends that this decision is not in harmony with that of East Helena State Bank v. Rogers, 73 Mont. 210 and that the rule in the latter case was the one in effect at the time this tax arose. We fail to see any merit in this contention since under the laws of this state, as interpreted by our Supreme Court in the case of Butte & Superior Mining Co. v. McIntyre, 71 Mont. 254, the taxing officers of the state have authority to tax property that has escaped taxation for previous years. This is by virtue of Section 11, Chapter 3 of the Laws of 1923, as well as by virtue of Section 2034 R. C. M. 1921. The Supreme Court of Montana in the above cited case, in considering the question of the right to tax property which had been omitted from taxation through error or mistake, among other things said:

> "These taxes are just as much due now as they were in the year 1920. The legal obligation to pay is present and subsisting. The duty to pay is a continuing present obligation just as imperative today as it was in 1920."

The decision in that case was rendered in September, 1924. The legislature of Montana has also outlined the procedure to be followed in taxing the interest of stockholders in state banks to the extent of their value dependent upon investments in tax exempt securities. (Chapter 64, Laws of 1927.) Hence it follows that under the decision of the Montana Supreme Court there is no discrimination in the method of taxing state and national banks in Montana for while the taxable moneyed capital of a state bank does not embrace investments in tax exempt securities the shares of stock are permitted and required by the constitution and laws of the state to be taxed to the extent that they have a value above and beyond the property of the bank which has been taxed. It is elementary moreover that the construction placed upon the constitution and laws of the State of Montana by the

Supreme Court of this state, as well as their operation will be followed by this court.

In Swiss Oil Corporation v. Shanks reported in Advance Opinions of the U. S. Supreme Court on March 15, 1927, page 410, the court speaking through Mr. Justice Stone said:

> "As the case is brought here from a state court, the construction put by the court below upon the statutes and Constitution of its own state is not open to review here."

Other cases reaching the same conclusion are the following:

Southwestern Oil Co. v. Texas, 217 U. S. 114, 119, 54 L. Ed. 688, 691, 30 Sup. Ct. Rep. 496;
Brown-Forman Co. v. Kentucky, 217 U. S. 563, 569, 54 L. Ed. 883, 885, 30 Sup. Ct. Rep. 578;
Millsaps College v. City of Jackson, Adv. Op. Dec. 1, 1927, page 62;
Board v. Illinois, 188 U. S. 662; 47 L. Ed. 641-649.

II.

THE DEDUCTION OF TAX EXEMPT SECURITIES FROM THE VALUE OF THE MONEYED CAPITAL OF A STATE BANK AND THE FAILURE TO DO SO IN FIXING THE VALUE OF THE SHARES OF STOCK IN A NATIONAL BANK IS NOT UNLAWFUL DISCRIMINATION AGAINST A NATIONAL BANK.

Before the assessment, or the statutes under which it was made, will be held to be void it must appear that they promote or foster an unfriendly discrimination against National banks and in favor of State banks.

Des Moines Nat'l. Bank v. Fairweather, 68 L. Ed. 191.

The restriction under the Federal Statute (Sec. 5219 as amended by Act of March 4th, 1923, 42 Stat. L. 1499) is, that the tax imposed by the State upon the shares of stock of a National bank "shall not be at a greater rate than is

assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of National banks."

Under Section 1999 Rev. Codes 1921 shares of stock in a National bank are placed in the same class as moneyed capital of a state bank, and by Section 2000 each is taxed upon the same percentage of its true and full value.

The moneyed capital of a state bank is ascertained by deducting, from the moneys and credits of the bank, the amount of its deposits and of any indebtedness representing money borrowed for use in the business. (Secs. 1999 and 2067 Rev. Codes 1921).

The value of the shares of stock of a National bank is ascertanied from the statement of the cashier showing the face value of the capital stock, and the amount of surplus and undivided profits, and by deducting the value of all real estate. (Secs. 2066 and 1999 Rev. Codes 1921.)

The statutes of the state, therefore, do not discriminate against National banks and in favor of state banks.

The discrimination complained of if it did exist (but we submit that none exists) is produced not because of any state statute, but arises because of the Federal statute exempting the securities in question from taxation by the states (Sec. 3701 U. S. Rev. Stat.; U. S. Compiled Stat. Sec. 6815.)

Hence, in the taxation of state banks the taxing officers deduct, from the moneyed capital, investments in tax exempt securities not because of the state statutes on the subject, but solely because of the Federal statute.

East Helena State Bank v. Rogers, 73 Mont. 210.

The state statutes do not produce any discrimination. The state in deducting investments in tax exempt securities from the moneyed capital of a state bank for the purpose of taxation simply yields to the exemption created by the Federal statutes.

This Court has decided this precise question in the case of Des Moines National Bank v. Fairweather, 68 L. Ed. 191, where it said:

"Our concern here is not with a voluntary refusal or intentional omission on the part of the state to tax other moneyed capital of citizens as it taxes national bank shares, but with a submission by the state to superior laws of the United States, exempting a part of the other moneyed capital from state taxation. It may be helpful to state the matter in another way. National bank shares are taxable,—made so by the congressional assent. That much or little of the bank's assets consists of tax exempt securities of the United States does not affect the taxability of the shares— they being distinct from the corporate assets. The state taxes such shares without regard to the exempt government securities held by the bank. The capital of private bankers is taxable, save the part invested in exempt government securities. The state taxes all of that capital, save the exempt securities. They are exempt because the United States makes them so, and the state merely respects the exemption. In what is thus done does the state discriminate against national bank shares and in favor of other moneyed capital in the sense of the restriction? The question is not new, nor can it be regarded as an open one in this court.

"In New York v. Tax & A. Comrs., 4 Wall, 244, 18 L. Ed. 344, the question was whether, in the presence of the restriction, a state could assess and tax to their owners shares in national banks without making any deduction on account of tax exempt securities of the United States held by the banks, when, in taxing moneyed capital of individuals employed in competition with those banks, such a deduction was made. The court gave an affirmative answer to the question, saying, p. 256:

" 'The answer is, that upon a true construction of this clause of the act, the meaning and intent of the lawmakers were, that the rate of taxation of the shares

should be the same, or no greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens.

" 'This rule seems to be as effectual a test to prevent unjust discrimination against the share-holders as could well be devised. It embraces a class which constitutes the body politic of the state, who make its laws and provide for its taxes. They cannot be greater than the citizens impose upon themselves. It is known as sound policy that, in every well-regulated and enlightened state or government, certain descriptions of property, and also certain institutions,—such as churches, hospitals, academies, cemeteries, and the like,—are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform.

" 'The objection is a singular one. At the time Congress enacted this rule as a limitation against discrimination, it was well known to that body that these securities in the hands of the citizens were exempt from taxation. It had been so held by this court, and, for abundant caution, had passed into a law.

" 'The argument founded on the objection, if it proves anything, proves that these securities should have been taxed in the hands of individuals to equalize the taxation; and, hence, that Congress, by this clause in the proviso, intended to subject them, as thus situated, to taxation; and, therefore, there was error in the deduction. This we do not suppose is claimed. But if this is not the result of the argument, then the other conclusion from it is, that Congress required that the commissioners should deduct the securities, and at the same time intended the deduction, if made, should operate as a violation of the rate of the tax prescribed. We dissent from both conclusions.' "

To the same effect are:

Davenport Nat'l. Bank v. Board of Equalization (Ia.), 19 N. W. 889;
Jenkins v. Neff, 62 N. Y. S. 321.

There can no longer be any doubt as to the right of a state to tax the interest of a stockholder in a National bank without any deduction for investments of the bank in tax exempt securities.

Van Allen v. Assessors, 18 L. Ed. 229;
People v. Com'rs. of Taxes, 18 L. Ed. 344;
Des Moines Nat'l. Bank v. Fairweather, 68 L. Ed. 191;
First Nat'l. Bank of Shreveport v. Board, 3 So. 408.

A state statute relating to the taxation of national banks will not be condemned as discriminatory when it goes as far as the state has authority to go in taxing state banks in the same manner.

Lionberger v. Rowse, 19 L. Ed. 721.

III.

IF THE ASSESSMENT IS DISCRIMINATORY THE PLAINTIFF BANK IS NOT ENTITLED TO ALL THE RELIEF DEMANDED.

The prohibition of Section 5219 is that the shares of stock of a national bank shall not be taxed at a greater rate than other moneyed capital competing therewith. The clear implication is that it may be taxed at the same rate. If the plaintiff bank is entitled to any relief it is only such relief as represents the excess amount of its taxes as compared with those of state banks, if any excess there be. Cummings v. Bank, 101 U. S. 154, 25 L. Ed. 903.

Certainly the plaintiff in error is not entitled to complete exemption from taxation.

IV.

PLAINTIFF IN ERROR SHOULD HAVE SOUGHT RELIEF FROM THE COUNTY AND STATE BOARDS OF EQUALIZATION.

Plaintiff in error is not entitled to bring an action in court to recover taxes erroneously or unequally assessed or to complain that other property is escaping taxation, before first filing with the County Board of Equalization a written application under oath showing the facts upon which it is claimed such reduction should be made. Sec. 2115 R. C. M. 1921.

The essence of the complaint is that an element of value of shares in the state bank represented by U. S. Bonds and securities has not been taxed. The tax on the shares of the plaintiff in error is not illegal. The taxing officers of the state had jurisdiction of the person and subject of the tax and if any reduction in the value of its shares should be made by reason of failure of the taxing officers to reach the same element of value when reflected in shares of the state bank, complaint should have been first lodged with the County Board of Equalization having power to increase or lower any assessment so as to equalize and make it conform to the true value of such property in money, Sec. 2114, 2120, R. C. M. 1921, or in event of failure to obtain relief from the County Board of Equalization to appeal to the State Board of Equalization which has power to change, increase, or decrease assessments made by county assessors among the several counties of the state and between individual taxpayers and to exercise such authority and do all things necessary to secure a fair, just and equitable valuation of all taxable property among counties between the different classes of property and between individual taxpayers. Sec. 8, Ch. 3, Laws of 1923. The Supreme Court of Montana in the course of its opinion (R. 32-33) said:

> "Plaintiff's complaint is directed against the taxing system of the state with respect to the subjects under consideration rather than against the manner in which the taxing authorities have construed and executed the laws. In other words, the attack is upon the

law rather than upon its administration."

It further said (R. 30):

> "The shares of the Security Bank & Trust Co. were not taxed for the year 1925, but was the failure to tax because of an unfriendly discrimination by act of the Legislative department or through a misconception of the law on part of the officers of the state and county who are charged with the execution of the laws?"

The attack should have been directed against the execution of the law rather than against the law. Before resorting to an action in court plaintiff in error should have appealed to the taxing officer and boards to correct their mistake.

The complaint (R 1-17) does not allege that plaintiff before bringing suit had filed written application to the County Board of Equalization for reduction of taxes claimed or for equalization of the tax to conform to assessments of other similar property and the pleading is rendered insufficient by reason thereof under repeated rulings of the Supreme Court of Montana and other states. Belknap Realty Co. v. Simineo, 67 Mont. 359; 215 Pac. 659; State v. State Board of Equalization, 56 Mont. 413; 446; 185 Pac. 708; Danforth v. Livingston, 23 Mont. 558; N. P. Railway Co. v. Patterson, 10 Mont. 90; First National Bank of Missoula v. Bailey, 15 Mont. 301; Genesse Valley National Bank v. Livingston, 53 Barb. 223; Stanley v. Albany County, 121 U. S. 535, 30 L. Ed. 1000; Williams v. Albany County, 122 U. S. 154, 30 L. Ed. 1088; Western Union Tel. Co. v. Missouri, 190 U. S. 426, 47 L. Ed. 1122; First National Bank of Hopkinsville v. City of Hopkinsville, 108 S. W. 311; 16 L. R. A. N. S. 685; U. S. Trust Co. v. New York, 144 N. Y. 488; 39 N. E. 383; Foster v. Van Wyck, 41 How. Pr. 493; Swift v. Poughkeepsie, 37 N. Y. 511; Detroit River Sav. Bank v. Detroit, 14 Mich. 81, 72 N. W. 14; Michigan Savings Bank v. Detroit, 107 Mich. 246; 65 N. W. 101; Stickney v. Bangor, 30 Me. 404; Boston Water Power Co. v.

Boston, 9 Met. 199; Balfour v. Portland, 28 Fed. 738.

We therefore respectfully submit that the judgment of the Supreme Court of Montana should be affirmed.

Respectfully submitted,

L. A. FOOT,
Attorney General of Montana.

A. H. ANGSTMAN and C. N. DAVIDSON,
Assistant Attorneys General.
Attorneys for Respondents.

APPENDIX

Statutory provisions of Montana referred to in argument and not appearing in brief of planitiff in error.

PROPERTY NOT ASSESSED THE PREVIOUS YEAR.

Sec. 2034 (R. C. M. 1921). Any property discovered by the assessor to have escaped assessment may be assessed at any time, if such property is in the ownership or under the control of the same person who owned or controlled it at the time it should have been assessed.

ASSESSMENT OF OMITTED PROPERTY.

Sec. 11, Chapter 3, Laws of 1923: Whenever the State Board of Equalization shall, in any year, discover that any taxable property of any person has not been assessed in such year, or that it has been omitted from taxation during any previous year or years, the State Board may assess the same for such year or for such previous years. The order making the assessment shall contain the name of the person to whom the property is assessed, a general description of such property, its assessed valuation, the year for which it is assessed and the county in which the same is assessed. A copy of such order shall be transmitted to the officer of the county, in whose possession the assessment books of such county are at the time of the making of such order by the board, and such

officer shall immediately after receiving such copy, enter the assessment on the tax books of the county for the year in which such order is made, and thereupon such assessment shall have the same force and effect as though originally made by the County Assessor; provided, however, that before making any such assessment the State Board of Equalization shall give the person to whom such property is proposed to be assessed, notice of its intention to make such assessment, and the time and place when a hearing will be had thereon; such notice to be given either by registered letter or personal service at least ten days before the date so fixed for such hearing; and provided further that all assessments of omitted property must be made within three years after the end of the calendar year in which the same should have been assessed.

BOARD EMPOWERED TO EQUALIZE ASSESSMENTS.

Sec. 2114 (R. C. M. 1921). The board has power, after giving notice in such manner as it may by rule prescribe, to increase or lower any assessment contained in the assessment-book, so as to equalize the assessment of the property contained therein, and make the assessment conform to the true value of such property in money.

PERSON AGGRIEVED MUST APPLY.

Sec. 2115 (R. C. M. 1921). No reduction must be made in the valuation of property, unless the party affected thereby or his agent makes and files with the board a written application therefor, verified by his oath, showing the facts upon which it is claimed such reduction should be made.

BOARD MAY DIRECT ASSESSOR TO ASSESS IN CERTAIN INSTANCES.

Sec. 2120 (R. C. M. 1921). During the session of the board of county commissioners it may direct the assessor to assess any taxable property that has escaped assessment, or

to add to the amount, number, or quantity of property, when a false or incomplete list has been rendered, and to make and enter new assessments (at the same time canceling previous entries), when any assessment made by him is deemed by the board so incomplete as to render doubtful the collection of the tax; but the clerk must notify all persons interested, by letter deposited in the postoffice, postpaid, and addressed to the person interested, at least ten days before action is taken, of the day fixed when the matter will be investigated.

POWERS AND DUTIES OF STATE BOARD OF EQUALIZATION DEFINED.

Subdivision 5, Section 8, Chapter 3, Montana Session Laws of 1923. To adjust and equalize the valuation of taxable property among the several counties, and the different classes of taxable property in any county and in the several counties and between individual taxpayers; supervise and review the acts of County Assessors and County Boards of Equalization; change, increase or decrease valuations made by county assessors or equalized by County Boards of Equalization; and exercise such authority and do all things necessary to secure a fair, just and equitable valuation of all taxable property among counties between the different classes of property and between individual taxpayers.

POWERS AND DUTIES DEFINED.

Subdivision (6), Sec. 8, Chapter 3, Laws of 1923: To have and exercise general supervision over the administration of the assessment and tax laws of the state, and over assessors, county boards of equalization, boards of county commissioners, and other officers of municipal corporations, having any duties to perform under any of the laws of this state relating to taxation to the end that all assessments of property be made relatively just and equal at true value in sub-

stantial compliance with law, and to supervise the administration of all revenue laws of the State and assist in their enforcement, and for that purpose may visit each county in the state whenever deemed necessary, and may call, not to exceed one meeting of the county assessors each year at the capitol, for consultation and instruction, the expense of such attendance to be paid by the respective counties.

POWERS AND DUTIES DEFINED.

Subdivision (8), Section 8, Chapter 3, Laws of 1923: To direct proceedings, actions and prosecutions to be instituted to enforce the laws relating to the penalties, liabilities and punishment of public officials and persons, or their agents, for failure or neglect to comply with the provisions of the statutes governing the revenue of the State or municipal corporations; and to cause complaints to be made against assessors and other public officers to the proper District Court for their removal from office for official misconduct or neglect of duty.

(17)

SUPREME COURT OF THE UNITED STATES.

No. 207.—October Term, 1927.

The Montana National Bank of Billings, Plaintiff in Error, *vs.* Yellowstone County of the State of Montana and Henry S. Nutt, as County Treasurer, etc.	In Error to the Supreme Court of the State of Montana.

[April 9, 1928.]

Mr. Justice Sutherland delivered the opinion of the Court.

Plaintiff in error, a banking corporation organized under the laws of the United States, is engaged in a general commercial banking business in Yellowstone County, Montana. For the year 1925, an assessment for taxes was made by the assessor of Yellowstone County upon the shareholders, based upon the value of their shares of stock in the bank. The bank owned no real estate. In pursuance of the assessment, taxes were levied in the aggregate sum of $3,897.84 and demand was made for the payment of fifty per cent. of that amount, as provided by the Montana statutes. The bank paid the sum demanded under protest, claiming that the assessment and levy and the statutes of Montana under which they were made were invalid as being in conflict with Rev. Stats. § 5219, with certain provisions of the constitution of Montana, and with the due process and equal protection of law clauses of the Fourteenth Amendment to the Constitution of the United States. This action was then brought by the bank in behalf of its shareholders to recover the amount of the payment. The court of first instance sustained a general demurrer to the complaint and rendered final judgment against plaintiff in error, which, upon appeal to the state supreme court, was affirmed. 78 Mont. 62.

Here the argument is confined to the question whether there is a violation of the restriction upon the state power of taxation contained in Rev. Stats. § 5219 that the taxation of shares of national

banking associations "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." The contention that the laws of Montana, under which the assessment and levy were made, contravene this restriction, rests upon the fact that shares of national banks were valued for assessment purposes at an amount equivalent to the value of the corporate assets, including Liberty Loan bonds and similar securities of the United States, and were taxed accordingly, while shares of state banks were not assessed or taxed at all, and the banks themselves were taxed upon the value of their assets, after excluding such bonds and similar securities.

It is clear that the state statutes, as construed by the state supreme court *in the present case,* do not produce the discrimination asserted or any discrimination in favor of the moneyed capital employed by state banks in competition with national banks. That court now holds that the provisions of the state constitution and statutes require the state to tax the property of every state bank and also the shares to the extent that they have a value beyond that of the taxable property of the bank. In assessing and imposing taxes upon the corporations, the value of the United States securities owned by the corporations is excluded, because such securities are exempted from state taxation by the laws of the United States. But in the taxation of shares of state as well as of national banks, the value of these securities, so far as it contributes to the value of the shares, is included, because the shares are the property of the shareholders distinct from the corporate assets, which are the property of the banks. See *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, 518.

If this were all, there would be no discrimination within the meaning of the federal law. But it is not all. The assessment, as actually made, clearly violated the restriction in § 5219 here relied upon; and it was made in conformity with the state statutes as construed by the state supreme court in the earlier case of *East Helena State Bank* v. *Rogers,* 73 Mont. 210. In that case the requirement of the statutes, so far as it applied to state banks, was stated by the court as follows (p. 217):

"This state had the option to tax the shares of stock in state banks to the individual shareholders, or to tax the property of such banks to the banks themselves. It could not tax both at the same time. (Sec. 17, Art. XII, Constitution of Montana.) If it had

chosen the first alternative, it might then have assessed the shares at their full cash value without reference to the character of the securities in which the bank's funds were invested (Van Allen *v.* Assessors, 3 Wall. 573, 18 L. Ed. 229 [see, also, Rose's U. S. Notes]); but it chose to tax the property of the banks, and must abide the consequences."

The taxing officials, conforming to this construction of the state law, as they were bound to do, while they assessed, levied and collected the tax now under review, laid no tax whatever upon shares of state banking corporations, although, as the record shows, these shares had a very large taxable value over and above the value of the taxable property of the banks, due to the ownership by the banks of tax-exempt federal securities. That this resulted in a substantial discrimination against plaintiff in error within the meaning of the restriction contained in § 5219 does not admit of doubt. *Van Allen* v. *Assessors,* 3 Wall. 573, 581; *Mercantile Bank* v. *New York,* 121 U. S. 138, 148, 152; *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, 677.

Nevertheless, it is contended for the defendants in error that, since the exemption from taxation of the federal securities in the hands of the state banks is created by federal statute, the discrimination is one which the state could not avoid. It is said that it was so decided in *Des Moines Bank* v. *Fairweather,* 263 U. S. 103. But this view of that decision is entirely erroneous. The statutes of Iowa there under review expressly provide that shares of stock in national banks and state and savings banks and loan and trust companies located in the state shall be assessed to the individual stockholders; and shares of national banks and those of competing state corporations are put, for purposes of taxation, upon terms of exact equality. The provision of the Iowa statute which was assailed related to the assessment of capital employed by *individual* bankers (p. 105); and this Court held that the restriction of § 5219 was not violated because the state, perforce, allowed a deduction of federal securities in assessing the capital of such individual bankers; that the federal law made such securities exempt and the state merely respected the exemption. P. 117. The decision in no way affects the rule (*Van Allen* v. *Assessors* and other cases, *supra*) that in respect of the taxation of state *corporate* banks, the shares must be taxed as they are in the case of national banks, so far as necessary to prevent discrimination, and

that, in neither case, does the exemption of federal securities apply in the taxation of such shares.

It is true that the state supreme court in the present case expressly repudiated the construction theretofore put by it upon the state statutes in the *Rogers* case, *supra,* and, as already stated, adopted one to the exact contrary. But that does not cure the mischief which had been done under the earlier construction. That construction had already been acted upon by the taxing officials and the application thus made of the statutes had given rise to the present cause of action and an undoubted right to recover thereon. The statutes, as thus construed and applied to the concrete facts of the case, were invalid; and this is enough to justify the challenge here under consideration. *Cudahy Co.* v. *Parramore,* 263 U. S. 418, 422; *Ward & Gow* v. *Krinsky,* 259 U. S. 503, 510. Plaintiff in error cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury.

But it is said that the taxing officers of the county, in view of the later decision, now have the power to tax the shares of state banks and thus bring about an equality. As to this it is unnecessary to say more than that it nowhere appears that these officers, if they possess the power, have undertaken to exercise it or that they have any intention of ever doing so. It will be soon enough to invite consideration of this purely speculative suggestion when, if ever, the taxing officials shall have put it into practical effect.

Finally, it is urged that plaintiff in error may not maintain this action because of its failure to apply to the county board of equalization for an administrative remedy. We do not stop to inquire whether under any circumstances such remedy was open to the taxpayer, for the short answer is that the decision of the Supreme Court of Montana in the *Rogers* case would have rendered any such application utterly futile since the county board of equalization was powerless to grant any appropriate relief in the face of that conclusive decision. See *Hills* v. *Exchange Bank,* 105 U. S. 319, 321; *Whitbeck* v. *Mercantile Bank,* 127 U. S. 193, 199. Compare, *First Natl. Bank* v. *Weld County,* 264 U. S. 450, 454-455.

Judgment reversed.